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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-2931

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

vs.

SIMS CONSOLIDATED, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1975

No. 75-239

IRRIGATION AND POWER EQUIPMENT, INC. a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

vs.

SIMS CONSOLIDATED, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue from This Honorable Court to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on July 17, 1975.

A. OPINIONS BELOW

The lower court on various dates entered Memorandum Opinions, Orders and Judgments which remain un-

reported to this date, but those pertinent are printed in a separate Appendix filed herewith.

DATE OF FILING	TITLE OF ORDER	APPENDIX PAGE
October 31, 1973	Memorandum Opinion and Order	A-1a
June 24, 1975	Court of Appeals Opinion and Order, designated for publication in the Federal Reporter, second series. It has not yet been published.	A-30a
January 8, 1972	Pretrial Order of Bifurcation	A-43a
July 12, 1973	Order Concerning Completion of Trial	A-44a
October 1, 1973	Further Stipulation and Order Concerning Completion of Trial	A-46a
November 9, 1973	Judgment of Liability	A-48a
November 9, 1973	Order re Need for Motion for New Trial	A-51a
July 29, 1974	Judgment of Accounting for Royalties	A-53a
July 17, 1975	Denial of Petition for Rehearing	A-55a
July 29, 1975	Order Staying Mandate	A-57a
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	Agreement	A-58a
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B. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the lower court in the first instance was invoked on diversity of citizenship under 28 U.S.C. 1332 *et seq.;* and 28 U.S.C. §2201.

C. SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

The questions presented for review involve the orderly administration of civil justice under the Federal Judicial System and the prerogatives of the Executive Department of the United States Government in Foreign Affairs. They are as follows:

I. The purported "trial" in and by the lower court without a jury, which was sanctioned in full by the court of appeals, so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision because:

A. Trial in open court to which the parties have a right under the United States Constitution and by virtue of Rule 77(b) FRCP, was denied them in violation of the prior decisions of this Court in *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957) and *Wingo v. Wedding*, 418 U.S. 461, 94 S. Ct. 2842, 41 L. Ed. 2d 879 (1974), when the lower court, faced with a crowded docket, refused to conduct an evidentiary hearing in open court, and required the parties, in lieu thereof, to elect between a reference to a master under FRCP 53(b) or completion of oral testimony by videotape transcription which was thereafter to be viewed by the judge in camera.

B. The lower court did not open and consider depositions containing stipulated admissible testimony of four individual witnesses. In lieu thereof, the trial court relied on a summary of the testimony prepared by respondent's counsel submitted with the admonition that petitioners objected and that both counsel urged that summaries not be used in lieu of testimony. That action deprived the parties of due process of law guaranteed by

the Fifth and Fourteenth Amendments to the United States Constitution.

C. The court of appeals wrongfully invaded the fact finding province of the lower court when it conducted an independent review of testimony contained in the aforesaid four sealed depositions and thereafter issued an independent conclusion of law that "reversible error did not occur from the trial court's apparent failure to read the depositions verbatim." Such action is in direct violation of this Court's decisions in *Fahy v. State of Conn.*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) and *Chapman v. State of Calif.*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 24 ALR 3rd 1065 which establish that such action by a trial court cannot be harmless error under the FRCP Rule 61 and 28 USC 2111, because the error related to the substantial rights of the parties and prejudice was clearly a possibility. Accord: *Citron v. Aro Corporation*, 377 F. 2d 750 (CCA-3 1967) *cert. den.* 389 U.S. 973, 88 S. Ct. 473, 19 L. Ed. 466.

II. The court of appeals erred in refusing to apply Article VIII, Sec. 2(b) of the International Monetary Fund Articles of Agreement and thereby revoked them *de jure*. Such a decision is an important question with respect to the doctrine of separation of powers under the United States Constitution which has not been but should be decided by this Court. *National City Bank of New York v. Republic of China*, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955).

D. CONSTITUTIONAL, STATUTORY AND TREATY PROVISIONS INVOLVED

Constitution of the United States, Art. 6.

"This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all

treaties made, or which shall be made, with the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Constitution of the United States, Amendment 5, Section 1.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The International Monetary Fund Articles of Agreement, Article VIII, Sec. 2(b) 60 Stat. 1401, 1411 (1945).

"Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

The Banking (Foreign Exchange) Regulation of Australia, Sec. 8(1) whose pertinent portions provide that:

"a person shall not, except with the authority of the Bank * * * enter into any contract or agreement (not being a contract or agreement for the purchase of goods) * * * so that a right whether actual or contingent * * * to receive a payment, or to the performance of any service, whether in Australia or elsewhere, is created * * * in favour of a person resident out of Australia; * * *"

Rule 53(b) of the Federal Rules of Civil Procedure.

"A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

Rule 61 of the Federal Rules of Civil Procedure.

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refused to take such action, appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 77(b) of the Federal Rules of Civil Procedure.

"All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby."

Title 28, U.S.C. 2111.

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

E. STATEMENT OF THE CASE

1. The Parties

The petitioners, appellant and defendants below, are Irrigation and Power Equipment, Inc. (IPE), Layne & Bowler Pump Company (L&B), and A. O. Smith Corporation (Smith), all being domestic corporations. Smith is the principal party petitioner in interest by virtue of its indemnification of the other petitioners.

The respondent, appellee and plantiff is Sims Consolidated, Ltd., an Australian corporation (Sims) and is successor to Consolidated Metal Products Proprietary, Ltd. (CMP), and Grasslands Pty., Ltd. (Grasslands).

In this statement, the references made will be to the separate Appendix filed herewith.

2. Course of Proceedings Below

Complaint was filed by Sims on December 20, 1971, seeking (1) a declaratory judgment of enforceability of a purported reciprocal and mutually exclusive international licensing contract; (2) accounting for royalties; and (3) damages and injunction for business tort.

A general denial and certain affirmative defenses were interposed, along with a counterclaim seeking return of royalties already paid. A pre-trial order set a bifurcated trial with May 22, 1973, as firm trial date on liability. (App. p. 43a)

On May 17, 1973, the clerk informed counsel that trial of the liability issue would not proceed on May 22, 1973, because of a crowded docket. Counsel were peremptorily summoned to appear before the Chief Judge of the trial court, where petitioners moved for continuance, which

was denied because it appeared that three witnesses residing in Australia were to testify, and one (who was to testify on behalf of the respondent) was already present; one was enroute to testify on behalf of the petitioners and the third, another witness for respondent, was preparing to leave Australia. Petitioners offered to bring their witness to the United States again if the continuance was granted, but the denial was made firm. Thereafter, as an alternative to the continuance which was denied, the Chief Judge, *sua sponte,* ordered the parties to elect between (1) reference to a master under 53(b) FRCP; or (2) taking all remaining testimony on videotape. The parties protested but complied with the order of election through designating the second alternative decreed by the Chief Judge.

The videotape trial testimony was taken, either in petitioners' counsels' office or that of the taping agency, on May 21, 22 and 23, 1973. It was all without intervening pre-trial conferences or protective orders, notwithstanding that (1) neither the Judge nor any counsel for the parties had ever participated in this type of videotape trial testimony procedure; (2) the procedure for videotaping trial testimony (as opposed to videotape depositions which are rare) is virtually unknown in the Federal Judicial System and elsewhere in state court procedures excepting only Ohio; and (3) the wisdom of or necessity for protective orders was the subject of an informed article in the March 1973 issue of the ABA Journal suggesting that the technique required, at least, evidentiary conferences with the judge prior to taping. The cameraman made the decisions as to who would be photographed and how; witnesses were not sequestered nor was any procedure adopted governing whose testimony on completed tapes could be viewed by whom and when;

no provision for attendance of the public was made; marking and subsequent identification of exhibits were confusing to counsel and the witness. Not a single indicia of the basic form of a trial was observed. Upon completion thereof, the trial court set May 23, 1973, for an informal conference. Counsel again protested use of the videotape trial process, but it was stipulated and ordered that the trial court would consider both the discovery depositions previously taken in ordinary course and videotaped transcripts as the trial testimony. (App. p. 45a)

At the May 23, 1973 hearing, certain other decisions were made by the court; the parties were to prepare a list of objections made in the depositions or videotaping and, in addition, present summaries of testimony. Notwithstanding counsel could not agree in preparing the evidentiary summaries, respondent alone filed its evidentiary summary, with a letter noting the objections thereto by petitioners' counsel, and wherein both parties urged the trial judge not to use the respondent's summary in lieu of sworn testimony appearing in the actual transcripts. (App. p. 66a) The case came before the trial court again on September 10, 1973, and the parties again voiced their objections to the trial procedure. (App. p. 46a)

The court on October 4, 1973, heard oral argument on the liability issue and on October 31, 1973 issued its Memorandum Opinion in which it ruled arbitrarily, that "all * * * objections to witnesses or exhibits or otherwise, are overruled." The court found the validity of the contract to be governed by California law, and that it was valid and directed the petitioners to give an accounting to date. (App. p. 1a) On its face, the opinion declares that it is based, in part, on the "summaries of the tran-

scripts prepared by counsel." (App. p. 2a) An accounting was subsequently filed and the issues with respect thereto heard in open court without need for a master. Final judgment was rendered on July 31, 1974, awarding some $95,000.00 to the respondent as royalties due to date and imposing continuing liability under the contract until 1982. (App. p. 53a)

On August 7, 1973, petitioners moved for a new trial or, in the alternative, to alter or amend the judgment and requested findings on uncontroverted facts, all of which were denied by the court as of September 19, 1974. Petitioners filed a Notice of Appeal on October 11, 1974. Oral argument took place on May 20, 1975. The court below rendered its opinion, affirming the trial court in all respects on June 26, 1975. Petitioners moved for a rehearing on July 8, 1975, which was denied on July 17, 1975. (App. p. 55a) Petitioners moved for and the court of appeals stayed its mandate until August 28, 1975. (App. p. 56a) An application for extension of the stay by this Court was denied by Mr. Justice White on August 18, 1975.

3. Facts

In 1960 or 1961, L&B sought to enlarge its deep well turbine pump business, and contacted Grasslands in Australia to determine whether a joint arrangement could be made to manufacture and sell L&B pumps in Australia. During his visit, L&B's president saw parts of a center pivot irrigation machine which Grasslands was making and selling in Australia under the trademark "Rainline". Thereafter, L&B became a "Rainline" dealer in the United States, through importing the units for resale and field assembly. There were no patents on the "Rainline" in the United States nor was patenting in the

United States possible because of failure by CMP to secure patents within one year after 1958, the year of patent issue in Australia. Neither was there any proprietary know-how. The "Rainline" had been in the public domain in Australia since 1958. Respondent conceded in the trial court that there were no patents or trade secrets involved and that the contract was not a patent or trade secret license. At the outset, L&B didn't know that; hence, L&B offered, gratuitously, to pay a royalty to CMP if L&B found it was more economical to manufacture the units in the United States. The "Rainline" was hydraulically operated and did not work here because of land contour and sand problems with which CMP was totally unfamiliar and could offer no help or know-how. During the next four years, L&B struggled with the problems caused by the "Rainline" and finally developed and patented its own electrically operated machine suitable for use in the United States, which it named "Raincat". Notwithstanding the "Raincat" used construction principles generic to the "Rainline" and other competitive devices all in the public domain, the "Rainline" and "Raincat" have almost nothing in common [Deposition of John Allwood, CMP's Chief Engineer, which was unopened by the trial court]. The contract under review concedes that L&B did not develop the "Raincat" from the "Rainline". (App. p. 58a) L&B commenced selling the "Raincat" in 1966.

CMP had begun in 1963 to press L&B for a written agreement on the royalty which L&B had gratuitously offered to pay. After more than three years of bickering, a proposed form of license contract was prepared by CMP's lawyer, approved by its Board, and signed by CMP in Australia in November, 1966. In Los Angeles on May 1, 1967, after making significant changes in the

proposed agreement, and without counsel present, L&B's Chairman and its President signed the revised agreement because the Chairman thought he had a moral duty to do so. CMP's Broinowski, who had signed the proposed agreement in Australia in 1966, signed it again. In view of the changes made, L&B was informed by Broinowski that his execution of the agreement in Los Angeles was subject to CMP Board's approval in Australia. That condition precedent to contract formation was subsequently denied by CMP's Broinowski; but it is the consistent pattern of CMP Board in giving approval to this agreement and another between the parties.

On May 16, 1967, the CMP Board ratified the changes made in the agreement but not the Broinowski signature affixed in Los Angeles [unopened deposition of Grellman] and had the agreement executed in Australia as if it hadn't been signed at all in Los Angeles. One year later, the parties recognized that an important part of the negotiations had been left open and closed the gap through a written change in the contract also effected in Australia.

The licensing agreement essentially provided, among other things, that, for a fifteen year term ending in 1982, each party was to furnish and license its respective know-how exclusively to the other party at a royalty of 2½% of net invoice price of sales; although, it is important to note that CMP's obligation to pay rests only on its use of items proprietary to L&B. On the other hand, L&B is required to continue to pay even if it gets nothing from CMP and even if CMP goes out of the business. In addition, the contract prohibits CMP from selling the L&B "Raincat" anywhere and prohibits L&B from selling the CMP "Rainline" anywhere. Neither trade-

mark is registered or in use in any country other than that of its origin.

L&B protested the continuing royalty arrangement within a year after the contract was signed, but CMP refused to change it. Smith purchased controlling interest of L&B in September, 1969 and in an attempt to keep out of litigation (assuming that if the contract was not mutually profitable, the parties would act, in good faith, to make it so), urged L&B to at least seek a reduction again in the royalty. CMP rejected the second request unless the term of the contract was doubled. L&B refused to consider that and consulted with Australian counsel to learn, for the first time, that the contract was void in Australia. Based on that conclusion, L&B rescinded the agreement on October 27, 1971, for, *inter alia* the reason that the agreement was void in Australia and unenforceable in the United States because CMP had violated Australian currency exchange regulations when it had failed to secure prior permission of the Commonwealth Bank of Australia to enter into the agreement.

Since 1945, both Australia and the United States have been parties to the International Monetary Fund Articles of Agreement. In keeping with those articles, Australia had issued certain foreign exchange regulations which required Australian citizens to secure the prior permission of the Commonwealth Bank of Australia before entering into a contract of the type under review. At no time prior to May of 1967, did CMP seek or receive the requisite prior authority of the Commonwealth Bank of Australia to enter into the agreement. Some four months after rescission, CMP surreptiously sought permission from the Bank to enter into the con-

tract and in doing so, did not inform the Bank that the contract had been rescinded. Permission, thus deceptively sought, was granted.

L&B ultimately decided to withdraw from the irrigation business and sold some (about ⅓) of its irrigation product inventory to IPE, some to Sargeant Manufacturing Company and some to Mel Brown, all former dealers of L&B. The balance of the inventory was scrapped or returned to vendors.

F. ARGUMENT

I. The Parties Have Not Had A Trial

A. The Decree Of Election Was Improper Under *LaBuy* and *Wingo*

The trial had been bifurcated. Only the issue of liability was to be tried first with a day certain set for May 22, 1973. (App. p. 43a) A day certain was not set for the hearing on accounting and damages, if any, because liability had to be first established. It was a relatively simple case to try until the order of election was issued. Patent validity was not in issue; there were no trade secrets involved. Antitrust issues were raised but relevancy of the market was not involved. It was, substantially, an ordinary contract action of a type tried every day in our courts, both state and federal, without difficulty. However, as the day certain for the bifurcated trial on liability approached, it became evident that because of a crowded docket, no judge would be available to conduct the trial. (App. p. 44a) It was at that juncture when the unbelievable confusion, error and gross injustice commenced. The Chief Judge summoned the parties to an informal conference where he confirmed

that trial on liability would not commence on May 22, 1973, and no definite date in the reasonably near future could be established. After denying the petitioners' motion for continuance, and as an alternative thereto, the Chief Judge decreed that the parties were to proceed with "trial" and ordered, *sua sponte,* that they elect either a reference under 53(b) FRCP or transcription of the witnesses' testimony on videotape, to be thereafter viewed by the trial judge. The parties protested, but the order was made firm and the parties complied.

It is clear, that if the order to elect is deemed proper and the affirmance thereof by the court below is permitted to stand, this Court has seen *LaBuy v. Howes Leather Co., supra,* overruled by the Court of Appeals for the Tenth Circuit. *LaBuy* firmly established that reference to a master cannot be undertaken simply because of a crowded docket. The court below attempts to uphold the action of the Chief Judge by suggesting that because the trial was to involve an "accounting" and "difficult computation of damages", an order of reference was proper. There is nothing on the record to sustain that statement as being of concern to the Chief Judge or the parties. It is a fictional bootstrap assertion made up out of whole cloth by the court of appeals, because at the time the erroneous order was decreed, there was no accounting or damage computation involved. The sole issue was liability. A reference, if it is necessary, can be undertaken after liability has been established; that concept was approved by this Court in *LaBuy* and is fairly common. Similarly, the distant residence of witnesses cannot be an "exceptional condition" under 53(b) FRCP for if it is, then any action which involves witnesses with distant residences can be referred. The exception then becomes the rule in such cases. Hence, the Chief Judge was act-

ing improperly and in abuse of discretion in requiring that procedure to be even considered as a substitute for a trial in open court.

The other alternative, decreed by the Chief Judge, involving the balance of evidentiary testimony being transcribed on videotape and thereafter to be viewed in camera by the trial judge is violative of *Wingo v. Wedding, supra.* If the decision of the court below is permitted to stand, *Wingo* will have been overruled. *Wingo* has established that trial testimony taken before a master, with audio transcription, which transcription was then to be considered by the trial judge *de novo,* did not grant the due process inherent in a hearing or trial which is guaranteed by the constitution. Except for the differing method of transcription (video rather than audio) that is all there was here. Hence, the Chief Judge was acting in abuse of discretion in requiring that procedure to be a substitute for a trial in open court.

As this Court knows, the use of videotape as a trial record presents problems. See Articles in 59 ABA Journ. 273 (March, 1973) and 61 ABA Journ. 956 (August, 1975). The Chief Justice of this Court remarked in 1970 that such problems are all open to solution; and we agree. However, the solution should not be reached in experimental procedures where fundamental rights are involved. They are and should be the subject of continuing professional study and rule making by appropriate action of this Court within the Federal Judicial System. See separate section, *Post,* p. 21. The trial courts are waiting desperately for someone to do it. *Jarosiewikz v. Conlisk,* 60 F.R.D. 121 (N.D. Ill. 1972)

B. The Refusal Of The Trial Judge To Read And Consider All The Evidence Was Improper

1. The Evidence Ignored Had Been Declared Admissible By Stipulation And Order

Petitioners are at a loss to explain why the decision of the court of appeals consistently qualifies the refusal or failure of the lower court to read and consider almost half of the oral (four out of nine witnesses were ignored) evidence as being "apparent". (App. p. 39a) There was nothing which was only "apparent" about it. The testimony in question was contained in four of the depositions taken in ordinary course, sealed and filed in court and by order and stipulation admitted in evidence. In preparation of the record on appeal, petitioners' counsel found them to be still sealed! The physical evidence demonstrates that for reasons known only to the Judge, he, point blank, decided not to or refused to read and consider them. Hornbook law tells us that such action is impermissible judicial consideration which constitutes reversible error, because the evidence contained therein had been stipulated by the parties and ordered, by the Judge to be admissible evidence. (App. p. 45a and 47a) We are not concerned with discretionary rulings on admission or exclusion of evidence; but rather with the decision not to consider it at all after it had been admitted as a category not through examination and consideration.

2. Use Of The Summary Of Evidence (Over Objection Of All Parties) Prepared By The Advocate Of Only The Respondent Was Wholly Improper

The Trial Judge had ordered that counsel prepare a stipulated summary of the evidence. Counsel for the parties could not agree on summaries which fairly presented facts deemed necessary by each respective counsel, because each proposed summary viewed them differently. Only by a trial can a judge hear all the facts and judge the credibility of the witness who relates them and then render a complete decision. The summary prepared by counsel for respondent was submitted to the court with the admonition that counsel for petitioners objected and, because both counsel could not agree on the content of the summary, it was not to be considered in lieu of sworn testimony. The Memorandum Opinion of the trial court declares, on its face, that the court considered the "summaries of transcripts prepared by counsel" which is untrue, because counsel for petitioners had not filed any summary! The use of the summary filed by only respondent's counsel was improper because the court had not considered almost half of the actual testimony and relied on a distortionate view thereof in respondent's summary. It is as though the Judge decided to take a recess but directed that the trial should continue in his absence and, upon returning to the bench, heard one or two witnesses, conferred with plaintiff's counsel on the substance of the testimony he missed and then issued an opinion and findings. The Trial Judge's action and the affirmance thereof by the court below are shocking to good conscience and should be remedied by issuance of the Writ herein prayed for to enable complete review thereof.

3. Petitioners Did Not Waive Their Right To A Trial

When the Chief Judge erroneously ordered the election by the parties, they had two reasonable choices. One was the subject of *LaBuy;* to wit: apply to the court below for a writ of mandamus to be issued requiring the trial court to grant a trial as opposed to the reference. The *LaBuy* majority affirmed the granting of the writ in that case, while the dissent pointed out that even under the aggravated situation present there, the order of reference was just another order subject to review on appeal, so mandamus should not have been issued. The record in *LaBuy* demonstrated an extreme condition because of the history of repeated unauthorized references by the trial bench in the seventh circuit. That condition is not present in the tenth circuit, so serious question exists as to whether the application for mandamus would lie as a proper exercise of discretion. *Will v. United States,* 389 U.S. 90, 88 S. Ct. 269, 19 L. Ed. 2d 305 (1967); *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 74 S. Ct. 145, 98 L. Ed. 106 (1953).

Perhaps if counsel in the case at bar were of the "activist" type decried so often by the public statements of the Chief Justice of this Court, counsel would have refused to comply with the order to elect so as to invite contempt and bring the issue up for review in that fashion. That did not and does not now appear to counsel as a reasonable alternative to compliance saving error for orderly appeal. Counsel's position in that respect is fortified by the recent opinion of this Court in *Maness v. Meyers,* — U.S. —, 95 S. Ct. —, 42 L. Ed. 2d 574 (1975). Thus, the only other reasonable alternative was to note the protest or objection to the order and then comply with it. That's what was done.

The form of compliance was the election to complete trial testimony on videotape. The court below has confused the subsequent election with the order of the Chief Judge requiring that election to be made and has ruled that the election was a waiver of the right to a trial. If compliance with the order through election of one alternative which it required, is now to be held a waiver of the right to a trial, then in the future, failure to either seek mandamus or if it does not lie, then to take the "activist" remedy, will constitute malpractice and the entire judicial system will be rendered chaotic through countless fragmented appeals.

Much was made, in the opinions of the trial judge and court below, of the absence of a formal objection to the order of election and the proceedings which ensued. No doubt exists as to the repeated protests of counsel to that order (App. pp. 43a, 46a, 65a) and the procedure which it commanded; but the facts then at hand must be recalled. Counsel for petitioners had moved for continuance which was denied; counsel renewed the motion by offering to stand the expense of a second trip from Australia for petitioners' witness if the continuance was granted, so as to permit a trial in open court. The order of election was made firm and the election demanded. The observation of the Court of Appeals for the Third Circuit in *Citron v. Aro Corporation*, 377 F. 2d 750 (CCA-3 1967) *cert. den.* 389 U.S. 973, 88 S. Ct. 473, 19 L. Ed. 2d 466 is most appropriate:

(377 F. 2d 750, 753)

> "To require an objection after such an emphatic announcement [by the trial court that he was going on a trip so that a recess of two weeks was being called] would seem to place an undue emphasis on form."

A realistic analysis of the videotaping of the trial testimony suggests, also, that notwithstanding the courts below and counsel have referred to that process as a videotape "deposition" in this action, it was only a "deposition" in the most technical sense of the word and should not be subject to Rule 30(c) FRCP or Rule 32(d)(3)(B) FRCP which have only customary depositions in mind. Admittedly, no authority for the proposition exists; but logic suggests the inappropriate character of those rules for trial testimony. The writers on the subject are quick to observe that a videotape deposition (for discovery, perpetuation of testimony and the like) should be conducted under one set of rules and that videotaping of trial testimony should be under a separate or additional set of rules. 59 ABA Journ. 273, 275. The study of such rules, along with videotaping in general, is presently under way through programs sponsored by the Federal Judicial Center (which has established a pilot project in four United States District Courts) and the Law Enforcement Assistance Administion, which has funded studies in Alaska, Pennsylvania, California, Hawaii, Indiana, Missouri, Montana, Ohio (which has already established rules), Pennsylvania, South Dakota, Wisconsin (which has issued proposed rules) and Wyoming. Thus, adequate measures for ultimate use of the technique in both the deposition and trial aspects are currently being employed and, hopefully, will produce rules which can be implemented. Until those rules are adopted, how can counsel (except to be obstreperous) object, for example to the camera operator determining the subject matter and composition of the picture? By what norm or standard would the trial judge test the objection? His ruling would be inherently arbitrary. In the interim, during which no rules

exist, experimentation with videotaped trial testimony, such as was done in this case, should be suspended because substantial rights of the litigants are always affected and with a high degree of probability that prejudice will occur as it did here.

C. The Inherently Defective Proceedings Below Do Not Constitute Harmless Error

The court of appeals held, "It is uncontested that the depositions of James Johnson, Clark Bower, Bernard Gillmann [sic] and John Allwood, none of which were videotaped, had apparently not been opened by the trial court prior to the entry of judgment." The court then went on, in a manner only slightly less than contumacious, to rule that petitioners had made no specific showing of prejudice as a result of the trial court's uncondoned dereliction of duty. (App. p. 38a) Further, faulty reasoning by citation of inapplicable authorities pertaining to the exclusion of evidence, induced the court to conclude that because, in its view, there was competent evidence to support the trial court's decision, then the error, if any, was harmless. The court is incorrect.

Petitioners are well aware of the provisions of Rule 61 FRCP and 28 U.S.C. §2111. Rule 61 was originally thought to apply only to trial courts; but it has been routinely applied to appellate courts since *University City v. Home Fire & Marine Ins. Co.,* 114 Fed. 288 (CA-8 1940). Any question remaining as to the application of Rule 61 to appellate courts, has been eliminated by adoption of 28 U.S.C. §2111.

The problem with the application of those rules to the proceedings in the case at bar, is that the court of appeals has ignored the provisions thereof concerning

errors or defects which "affect the substantial rights of the parties."

A party litigant in a civil proceeding has the right to a trial where all legally admissible evidence is considered before a decision is rendered and that right is substantial. In *Applebaum v. Am. Export Isbrandtsen Lines,* 472 F. 2d 56 (CA-2 1972), the court stated at page 63:

> "* * * The excluded statement did not relate to a fact established by other evidence as appellee suggests see 7 J. Moore, Federal Practice §61.07[2] at 1021 (2d ed. 1971), but rather to conflicting description of events which the jury admittedly had difficulty in reconciling. The substantial right of appellant to have the jury make its decision on the basis of all admissible evidence offered was therefore violated. Rule 61, FRCP."

The essential rights in a trial stem from the "due process" provisions of the Fifth and Fourteenth Amendments to the United States Constitution because due process means, at least, law in the regular course of administration through courts of justice. *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.,* 266 U.S. 285, 45 S. Ct. 61, 69 L. Ed. 288 (1924).

Does the denial of the right to a trial in the traditional sense, including the refusal to consider almost one-half the evidence constitute the denial of a substantial right? To ask the question, is to answer it, but this Court's pronouncement in *Estes v. Texas,* 381 U.S. 532, 561, 85 S. Ct. 1628, 14 L. Ed. 2d 543, *reh. den.* 382 U.S. 875, 86 S. Ct. 18, 15 L. Ed. 2d 118 (1965) (concurring opinion of Chief Justice Warren) sets the theme:

> "[T]he courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense coun-

> sel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to 'the integrity of the trial' process . . . As MR. JUSTICE BLACK said, in another context: 'The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' "

The oral evidence in this case consisted of testimony from nine witnesses, all of which testimony was presented either by deposition, transcribed in the customary fashion, or for trial purposes on videotape. The trial court did not read four of the nine depositions before rendering an opinion on the liability issues. This abdication of duty by the trial court does not, on appeal involve the question of whether there is any evidence to support the finding of the lower court. The responsive inquiry is whether that nonperformance of basic duty by the trial court can be characterized beyond a reasonable doubt, to be harmless error. *Chapman v. State of Calif., supra,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 24 ALR 3rd 1065

The testimony ignored was that of:

1. James N. Johnson, Secretary and General Counsel for A. O. Smith Corporation, who testified on the circumstances and reasons for the termination of the contract.

2. Bernard Grellman [erroneously "Gillman" in the court of appeals opinion], Managing Director of CMP, respondent's predecessor company, who testified on the negotiations (as to which he was respondent's officer in charge for almost four years) for and final signature by CMP of the agreement in question, the nature of the in-

formation exchanged under the contract and the deceitful manner in which the Commonwealth Bank of Australia's approval was obtained.

3. Clark Bower, President of the defendant L&B, whose testimony related to the circumstances of L&B being in the irrigation business, the negotiations leading to the contract, the circumstance for the signature of the agreement, the fact that L&B holds patents on several of the items on which L&B is paying a royalty to CMP, the useless know-how furnished by CMP, as dealer service, and on the circumstance for termination of the agreement.

4. John Allwood, Chief Engineer for Grasslands (a subsidiary of CMP), whose testimony related to the items he had invented and the nature of the information furnished pursuant to the agreement.

Issues in this case included, among others, questions as to the consideration for the agreement, the legality of a United States company paying a license fee on non-proprietary information, the circumstances of the signing of the agreement and how that might affect the choice of law, and patents being secured on inventions of L&B for which they are paying CMP a royalty. Can any appellate court say, beyond a reasonable doubt, that if the litigants had been afforded their constitutional right of a "trial", including consideration of all legally stipulated, admissible evidence, that the decision wouldn't have been different?

In purporting to do so, the court of appeals invaded the fact finding province of the trial court by substituting its review of the testimony not considered by the trial court and determining that the trial court's abject failure to consider it was not harmful. Considering, first, just

the action of the court, we respectfully submit that the declaration in *United States v. Andrews,* 462 F. 2d 914 (CA-1 1972) is directly on point, when it ruled at p. 918 that, "A party's day in court should not have to begin in the court of appeals." Second, in considering the result of the court's action, candor requires the suggestion that it is not only a fanciful flight into fantasy, but faulty legal reasoning as well. In *Kotteakos v. U.S.,* 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1945), this Court said at page 764 of 328 U.S.:

> "* * * It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on ones own, in the total setting. Cf. *U.S. v. Socony-Vacuum Oil Co., supra,* at 239, 242; *Bollenbach v. U.S., supra,* 614
>
> "This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, * * *"

In a jury trial, there is no acceptable theory which would permit a judge to determine that certain evidence which he admitted, on proffer out of the jury's presence, should not be thereafter submitted to it because on his "independent review" he finds that such evidence couldn't possibly affect the jury's deliberation. That's an exact analogy to the path perhaps taken in this case by the trial judge in its introspection, and certainly by the court of appeals in its analysis. Even if the court of appeals thought that the trial court's opinion was justified, the court totally ignored the denial to petitioners of a substantial right — the right to a "trial". As the Third Cir-

cuit correctly decided in *Citron v. Aro Corporation, supra,* 377 F. 2d 750 (CCA-3 1967); *cert. den.* 389 U.S. 973, 88 S. Ct. 473, 19 L. Ed. 2d 466, at page 753:

> "Since the error was one related to the substantial rights of the plaintiff, and prejudice was clearly within the range of possibility, a demonstration of prejudice was not required. *Snyder v. Lehigh Valley Railway Company,* 245 F. 2d 112, 115 (3rd Cir. 1957). It is the settled rule that an error 'which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.' *McCandless v. U. S.,* 298 U.S. 342, 347, 348, 56 S. Ct. 764, 766, 80 L. Ed. 1205 (1936) and cases therein cited;" [other citations omitted].

It is important to recognize that the decision which set the standard for determination of harmless error was a civil proceeding, a condemnation case where the trial court had wrongfully excluded a portion of the evidence on value of land although there was other evidence in the record on that issue. In *McCandless v. U.S.,* 298 U.S. 342, 56 S. Ct. 764, 80 L. Ed. 1205 (1936), this Court said at 347 of 298 U.S.:

> "In this situation §269 [of the Judicial Code, 28 USCA §391] is not controlling. That section simply requires that judgment on review shall be given after examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial. *U.S. v. River Range Co.,* 269 U.S. 411, 421; *Fillippon v. Albion Vein State Co.,* 250 U.S. 76, 82; *Williams v. Great Southern Lumber Co.,* 277 U.S. 19, 26."

There is no question that the standard for testing the propriety of a lower court's action is the same in a trial to the court as in a trial to a jury. *Chapman v. State of California, supra,* stated that this Court was relying on its discussion and analysis in *Fahy v. State of Conn.,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963). *Fahy* involved a trial to the court and this Court stated at page 86 of 375 U.S.

> "* * *We are not concerned here with whether there was sufficient evidence on which petitioner could have been convicted without the evidence complained of; the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. * * *"

It should be noted that the court of appeals has created a conflict by its decision in the instant case and its earlier decision in *Ottinger v. Siegfried,* 349 F. 2d 647 (CA-10 1965). In *Ottinger,* the trial court had excluded competent evidence and the court of appeals reversed, stating that the exclusion "*might* well have affected the outcome" [emphasis supplied]. In the case at bar, the court of appeals has ruled, as to evidence never considered, that the failure to consider it was harmless error. There is no way the court of appeals can reconcile *Ottinger* with its decision below and still conclude that the trial court's decision herein *might* not have been different if all legally stipulated, admissible evidence had been considered by the judge prior to the rendition of opinion.

It is very significant that the decision in *Ottinger, supra,* can be reconciled with this court's decision in *Fahy, supra.* The test promulgated by this Court in *Fahy* was outlined as "* * * the question is whether there is a reasonable possibility that the evidence complained of

might have contributed to the conviction * * *" and in *Ottinger* the test was whether the evidence "might well have affected the outcome." They are easily reconciled and make it strikingly evident that the decision in the case under review is directly contrary to both of them.

The authorities cited by the court of appeals in justification of the actions of the trial court, do not support its opinion. They are concerned with exclusion of evidence by a trial court judge; but that requires, first, a conscious consideration of the admissibilty of evidence as it pertains to the facts under governing law. The complete failure of a trial judge to consider evidence, the admissibility of which had been stipulated by the parties and confirmed by his own order, is not exclusion of evidence; it is the total denial of the right to trial and in contravention of the parties' right to due process of law. It can hardly be harmless error.

II. The International Monetary Fund Articles of Agreement Are Controlling And May Not Be Ignored

The United States was a participant in the Bretton Woods Conference in 1944, and is a signator of the International Monetary Fund Articles of Agreement (herein IMF), 22 U.S.C. 286; Australia is also a signator of the IMF. Those treaties have been negotiated by the Executive Department of the United States Government and were approved by the Senate. 60 Stat. 1401. Thus, as a matter of general constitutional law, the courts of the United States, both state and federal, are bound by them and cannot ignore nor refuse to enforce them. United States Constitution, Art. 6; *United States v. Minnesota,* 270 U.S. 181, 46 S. Ct. 298, 70 L. Ed. 537

(1925); *United States v. Rauscher,* 119 U.S. 407, 7 S. Ct. 234, 30 L. Ed. 425 (1886). Treaties constitute the supreme law of the land and control any other federal or state law or rule which is in conflict, even if application of their terms requires reversal of the judgment below. *United States v. The Schooner Peggy,* 1 Cranch (U.S.) 103, 2 L. Ed. 49 (1801).

Petitioners' expert, Queen's counsel from Australia testified that the contract in issue was one subject to the exchanged control regulations of Australia (Ante, p. 5) and that the undisputed failure of CMP to secure approval of the Commonwealth Bank, prior to entering into the agreement, was contrary to the regulations and rendered it void, *ab initio,* in Australia. There was no controverting evidence. Notwithstanding the incredible testimony which supported the theory, the lower court found the contract to be governed by and valid under California law and refused to give extraterritorial effect to the Australian banking regulations. However, the lower court spoke only to *validity* of the contract and both it and the court of appeals arbitrarily ignored the controlling IMF provision which speaks to the *enforceability* of the contract. The IMF Articles of Agreement, Article VIII, Sec. 2(b) provide:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member." 60 Stat. 1401, 1411 (1945).

Fortunately, the question does not often arise, but in those instances in which it has, courts in the United States, other than the lower court and court of appeals here, have ruled that the quoted language means exactly

what it says. In *Banco Do Brasil v. Israel Commodity Co.,* 12 N.Y. 2d 371, 190 N.E. 2d 872 (1963), the New York Court of Appeals had before it consideration of Article VIII, Sec. 2(b), and commented as follows:

> "A further reasonable inference to be drawn from the provision is that the courts of no member should award any recovery for breach of an agreement in violation of the exchange controls of another member. Indeed, the International Monetary Fund itself, in an official interpretation of subdivision (b) of section 2 issued by the Fund's Executive Directors, construes the section as meaning that 'the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example, by decreeing performance of the contracts or by awarding damages for their non-performance.' "

Accord: *Theye Ajuria v. Pan American Life Insurance Company,* 245 La. 755, 161 So. 70, *Cert. denied,* 377 U.S. 977, *reh. denied,* 379 U.S. 972.

Therefore, if the Executive Department of the United States Government is to continue to have influence in the restructuring of any international monetary reforms with the retention of the United States dollar in some pivotal role, a United States court cannot permit evasion of foreign currency regulations in effect in other countries through accidental or expedient arranging of contractual affairs in the United States. That would negate any effort on the part of the IMF signatories to shore up the value of their own currency and play even greater havoc with balance of payments and exchange rates. To allow an action such as this to succeed here, in face of the clear language of the IMF to the contrary, would constitute a *de jure* renunciation of treaty obligations of the United States by the court of appeals and lend credibility to the charge of faithlessness in international af-

fairs which is so often leveled at this country today. The public policy of the United States would be frustrated and the separation of powers doctrine will suffer substantial diminution.

We spend no time or effort on the patently ridiculous assertion that the purported approval *nunc pro tunc* issued by the Bank four months after rescission had taken place, cured the defect. That approval was induced by a purposeful misrepresentation undisputed, undenied and unexplained in the evidence. That constitutes fraud. Petitioners' counsel cannot refrain from expressing amazement at the effrontery which sponsors such an assertion and accompanying disillusion that the assertion has, thus far in both courts below, not been found wanting. It is unthinkable that this Court will do likewise.

G. CONCLUSION

I.

The foregoing demonstrates (a) the basic error of the trial court in requiring the parties to elect to present trial testimony either by reference under 53(b) FRCP, which violates *LaBuy;* or through transcription on videotape for viewing by the trial judge, in a *de novo* process, which violates *Wingo;* and (b) the basic error of the trial judge in (1) refusing to consider all of the evidence properly before it by its own order and (2) substituting for such unconsidered testimony, a summary thereof prepared only by counsel for respondent.

By virtue of either of such basic errors, or by any combination of them, the parties were denied a substantial right; towit, the constitutional right of trial in open court. The sanction of these errors by the court of appeals, brings to this Court a series of judicial acts which so far depart from the accepted and usual course of ju-

dicial proceedings, as to call for an exercise of the powers of supervision by this Court.

II.

Both courts below elected to ignore the controlling provision of the International Monetary Fund Articles of Agreement, which provision expressly dictates that, irrespective of its validity, the contract is unenforceable in the courts of the United States of America (a party signatory to those Articles) because it was entered into in violation of the currency exchange regulations in effect in Australia, also a party signatory to those Articles.

That is an important federal question which has not been but should be decided by this Court.

III.

For any or all of the foregoing reasons, the writ herein prayed should issue to review the decision of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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75-293 1

FILED

AUG 26 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. A-141

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

vs.

SIMS CONSOLIDATED, LTD.,

Respondent.

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX

FILED
United States District Court
Denver, Colorado
OCTOBER 31, 1973
JAMES R. MANSPEAK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED LIMITED, *Plaintiff,*

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation qualified as a foreign corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation doing business in the State of Colorado,

Defendants.

APPEARANCES:

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FINESILVER, Judge

MEMORANDUM OPINION AND ORDER

This is a declaratory judgment action seeking (1) a determination of the validity of a contract and (2) an accounting of any monies which may be due thereunder.

As there is complete diversity between parties, and the amount in controversy exceeds $10,000, the Court's jurisdiction is invoked under 28 U.S.C. Sections 1332(a)(2) and 2201.

On May 17, 1973, with the approval of Chief Judge Alfred A. Arraj, the parties agreed by stipulation that the testimony in this case would be presented by means of videotape* depositions, augmented by written transcripts of the depositions. The Court has viewed all the videotape depositions, studied the written transcripts and read summaries of the transcripts prepared by counsel. In addition the Court has examined the exhibits and the briefs submitted by the parties and conducted independent legal research. All tendered and marked exhibits are admitted in evidence and objections to witnesses or exhibits, or otherwise, are over-ruled.

PARTIES

Plaintiff, Sims Consolidated Ltd. ["Sims"] is an Australian corporation with its principal place of busi-

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* Regarding the use of videotape depositions, *See*: *Paramore v. State* 229 So.2d 855 (Fla. 1969); *Carson v. Burlington Northern Inc.* 52 F.R.D. 492 (D.Neb. 1971); McCrystal, *Videotape Trials, Relief For Our Congested Courts* 49 Denver Law J. 463 (1973); Murray & Watts, *Comments on A Videotape Trial* 45 Ohio Bar pp. 25-30, 51-56 (1972); Rifis, *Legal Aspects Of Videotape & Motion Pictures in Law Enforcement*, Traffic Institute, Northwestern University (1972); *Note, Videotape, A New Horizon in Evidence* 4 John Marshall J. Prac. & Procedure 339 (1971); Merlo & Sorenson, *Videotape — The Coming Courtroom Tool*, Trial Magazine Nov. - Dec. 1971 p. 55.

ness in Sydney, Australia. Sims is the successor in interest of Consolidated Metal Products ["CMP"], as the result of a merger in 1970. CMP is also an Australian corporation. Grasslands Pty. Ltd. ["Grasslands"] is an Australian company which manufactures irrigation equipment. Grasslands was purchased by CMP before its merger with Sims, and is now a wholly owned subsidiary of plaintiff.

Defendant, Layne and Bowler Pump Company ["L&B"] is a California corporation with its principal place of business in Los Angeles. L&B manufactures and sells vertical turbine pumps and irrigation equipment.

Defendant A. O. Smith Corporation ["Smith"] is a New York corporation with its principal place of business in Milwaukee, Wisconsin. Smith acquired control of L&B by a stock buy-out in 1969, and its main business is the manufacture and sale of equipment for the storage of produce.

Defendant Irrigation and Power Equipment Incorporated ["I&P"] is a Colorado corporation with its principal place of business in Greeley, Colorado. In October, 1971 I&P purchased all of the asset of L&B relating to the manufacture of the irrigation system which is the subject matter of this action.

STATEMENT OF THE CASE

The issue presented by this case is the validity of a contract entered into on May 1, 1967 by L&P and CMP. The subject of the contract was the payment of royalties on the sale of irrigation equipment. L&B had paid some $65,000 in royalties to CMP until June 1970. In October,

1970, L&B notified CMP that it would pay no more royalties under the 1967 contract on the grounds that the contract was terminated and rescinded. L&B have paid no royalties since 1970, and the plaintiff brings this action for a determination of the enforceability of the 1967 contract, and the payment of past due royalties.

Defendant contends that the contract was void *ab initio,* because it was in violation of the currency regulations of Australia. Further, defendant urges that the contract was illusory and void for failure of consideration, and in the alternative, that even if the contract was valid, it was validly terminated by L&B. L&B also presses a counter-claim for the royalty payments already made, on the grounds that the contract was void from its inception.

Plaintiff replies that the Australian regulations are not in point, that the contract is governed by California law, and that L&B's termination was contrary to the terms of the agreement.

Accordingly, the legal issues which the Court must resolve are:

(1) What law governs the validity and interpretation of the contract?

(2) Applying the appropriate law, is the contract valid?

(3) If the contract is valid, was its termination proper?

(4) If the termination was contrary to the contract terms, who is liable, as among the several defendants, for any royalities since 1970?

STATEMENT OF FACTS

In 1960, Mr. Robert Charles, then president of L&B, went to Australia at the request of his Board of Directors to explore the possibility of forming an association there for the manufacture and sale of L&B pumps. After surveying the Australian market, Charles decided that Grasslands was the most likely associate, and a joint venture known as Layne and Bowler Australasia Ltd. was formed as a fifty-fifty cooperative effort of L&B and Grasslands. L&B was to provide pumps, parts, and "know-how"; Grasslands, the manufacturing facilities and marketing organization in Australia. The joint venture related only to the Australian import of L&B's pumps, and had no involvement in irrigation equipment.

Approximately a year later, an L&B dealer in Idaho, Mel Brown, reported to Charles that he had been having difficulties with a self-propelled center pivot irrigation system manufactured by Valmont Industries Inc., for whom he was also a dealer. Charles recalled that on his visit to Australia he had occasion to see the manufacture of a similar irrigation system at the Grasslands factory, and thought that the Grasslands' systems, known as "Rainline", might be successfully employed in the United States.

Charles contacted Grasslands proposing his idea, and on August 4, 1961, L&B wrote to Grasslands stating that if "Rainline" units could be imported and marketed in the United States by L&B, the American company would pay Grasslands a royalty on sales in the United States.

From August 8, 1961, Grasslands began supplying L&B with plans, technical information, and "know-how" relating to the "Rainline" system. In late September Rex Schoeffel, Managing Director of Grasslands, and the man

with whom Charles had negotiated the previous year's joint venture, came to Los Angeles to discuss the details of the "Rainline" importation proposal. At this meeting in Los Angeles an oral agreement was reached under which L&B would purchase and market the "Rainline" equipment and pay Grasslands a five percent royalty on United States sales. It was also decided that the Australian equipment would need some modifications to be suitable for American use, due to differences in soil and water conditions in the two countries.

In early 1962, L&B learned that the name "Rainline" had already been appropriated by a small company in Nebraska, and was unavailable as a marketing name for the Grasslands' system. As a result L&B decided to use the name "Raincat" for the irrigation system it proposed to sell in the United States.

The first "Rainline" units arrived in the United States in March 1962. (Ten had been ordered by L&B on January 9, 1962; they were fitted with six inch pipe and were generally larger than the standard "Rainline" units.) From the beginning, difficulties arose in assembling the machinery. Two units had been sold to farmers in Nevada, but the presence of sand in the water there fouled the systems (Australian water generally comes from deep wells and is sand free) ; the six inch pipe which had been used instead of the four inch pipe provided too great a burden for the hydraulic drive; and the light track on which the units were propelled became bogged down due to ground contour and soil problems. It was clear that extensive modifications were needed before the system would function properly under American conditions.

In July 1962, the chief engineer of CMP (which had by now acquired Grasslands) came to the United States

to assist in modification of the units already sold and to help assemble the remaining units. CMP also provided technical assistance from Australia regarding modifications of the "Rainline", but the brunt of the modification work was borne by L&B.

At this point, a further complication was presented. Valmont Industries Inc. brought suit against L&B in 1963 claiming that the system L&B was marketing (the modified "Rainline") infringed the patent they held for the hydraulic powered, self-propelled, center pivot irrigation system known as "Valley". (This was the system Brown had had problems with in Idaho in 1961, which was the starting point for this entire matter). The suit was terminated pursuant to a stipulation that L&B would not market an hydraulic powered, self-propelled, center pivot irrigation system.

L&B continued its modifications on the "Raincat" system from 1962 to 1966. The principal changes from the original "Rainline" system were the replacement of the hydraulic power unit with an electric motor; the addition of heavier track (and eventually the replacement of track propulsion entirely, substituting pneumatic rubber tires); and the increase in the size of the units. Nevertheless the basic in-line control system (which regulated the flow of irrigation water by the change in angularity between the several sections of pipe); the trussing system for the support of the lengths of pipe; and the flexible joints connecting the pipes were all retained from the "Rainline" prototypes.

Against this backdrop, in 1963 CMP requested a written formalization of the operating royalty agreement between CMP and L&B. As a result of the extensive modifications L&B had undertaken, as well as the expense

of defending the Valmont patent litigation, L&B got CMP to agree to an exemption of the first $1,920,000 of "Raincat" sales from the royalty agreement, in addition to a reduction of the royalty from five to two and one half percent.

Negotiations as to the exact written terms were highly unproductive however, and though four or five proposed drafts shuttled across the Pacific from 1963 to 1967, no final agreement was reached. Finally, John Broinowski, executive chairman and proprietary head of CMP, came to the United States armed with the latest draft proposal of the royalty agreement in April 1967. On May 1, 1967, Broinowski and Charles met and attempted to come up with a final written instrument embodying the royalty agreement.

The result of their meeting in Los Angeles on that date was the contract here in issue. It provided for the grant to L&B of the right and license to use in the "Raincat" any design features of the "Rainline," in return for the payment by L&B to CMP of a two and one half percent royalty upon all sales of "Raincat" in excess of the first $1,920,000. The contract also granted L&B the right "to use all improvements, developments and patented features and designs developed in the future by CMP in connection with 'Rainline' equipment"; further, "CMP agrees that it will not license any other American Company to use, manufacture, sell or deal in any of the features or designs of the 'Rainline' equipment in the United States and Canada." The agreement also provided for mutual exchange of "full benefits of its respective researches and advices concerning self-propelled irrigators not only as existing but as to any improvement, additions or amendments thereto."

In addition, CMP agreed that "if and when" it should use any design features of the "Raincat" in its "Rainline" it would pay a two and one half percent royalty on all invoiced sales of "Rainline" units. The respective royalties were to be paid quarterly and the agreement was to remain in effect for fifteen years from the date of the contract (originally the term was to start on October 1, 1965, but Charles and Broinowski changed this date at the May 1, 1967 meeting). It is significant for a determination of existence of a contract that invoice dates and bookkeeping entries of both companies reflected May 1, 1967 as the commencement date of the formal agreement of the parties.

The main changes in the draft agreed to by Charles and Broinowski at their meeting were the provision cited above regarding the life of the licenses; a deletion of the recitation mentioning the previous sales of "Rainline" units to L&B (the 1962 sales); and an oral agreement, later formalized by letter, under which the exempted $1,920,000 in sales would be tolled from May 1, 1967, rather than October 1, 1965. The contract was to be binding on successors.

The agreement, as modified, was signed on May 1, 1967 by Charles and Clark Bower (an L&B Vice President) for L&B and by Broinowski for CMP. There is a conflict in testimony as to whether or not Broinowski told Charles that CMP would not be bound until the negotiated changes were ratified by the CMP board. Broinowski asserts that he had prior authorization to negotiate changes in the contract. In any event, the CMP board authenticated the contract, with the negotiated changes, at a meeting held on May 16, 1967.

The exempted sales total of $1,920,000 was reached in 1969. From that point until June 30, 1970, L&B paid

CMP a royalty total of $64,147.04 computed on "Raincat" sales of $2,565,881. After deducting U. S. taxes, the net received by CMP for this period was $44,902.01.

In 1968 Charles proposed a reduction in the royalty rate, but CMP refused to agree to this change. In 1969 L&B proposed that the royalty rate be reduced on sales over $1,000,000; CMP responded with a counter proposal to the effect that they would agree to this change only if the term of the license agreement were doubled.

In 1970 L&B had counsel review the contract and advise them as to its validity. On October 28, 1970, James Johnson, general counsel for Smith (which by now had acquired L&B), wrote to CMP to notify them that L&B was rescinding, repudiating and terminating the contract. The reasons stated by L&B for this action were, *inter alia,* that the agreement was in conflict with the applicable Australian law and that there was a failure of consideration and a mutual mistake of the parties regarding the adequacy of consideration.

L&B sold all assets used in the manufacture and sale of "Raincat" to I&P by contract dated October 12, 1971. That contract contains a provision specifically stating that L&B would indemnify I&P against any liability arising out of the May 1, 1967 contract with CMP.

In February 1972, Smith sold its controlling interest in L&B to General Signal Corporation. The contract effecting the transfer contains a provision indemnifying L&B (i.e. General Signal) against any liability on the May 1, 1967 contract. Smith agreed to this obligation to indemnify L&B.

Thus, should there arise any liability on the May 1, 1967 contract, it would fall on Smith, since the contract itself states that it is binding on successors of the parties

thereto, and Smith has indemnified its successors for such liability.

I.

APPLICABLE LAW

Before proceeding to deal with any resolution of the substantive issues on the merits as to the validity of the contract in question, the Court must determine what law governs the disposition of those issues. Following the rule laid down in *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the Court must apply the choice of law rules of the forum state in this diversity action.

The Colorado rule, as enunciated in *Denver Truck Exchange v. Perryman,* 134 Colo. 586, 307 P.2d 931 (1957), is that the law governing the validity, interpretation and the nature of a contract is that of the place where the contract was made.[1] The Tenth Circuit has stated that this is the proper course to be taken by this Court. *Mr. Steak Inc. v. River City Inc.* 460 F.2d 666 (10th Cir. 1972).

In *Perryman,* the Court stated that "The ultimate criterion of the place where a contract is deemed to have been made is the place where the last act necessary to complete it was done." 307 P.2d at 810. On the facts presented in *Perryman* (which involved an oral agreement to transport a truck from Michigan to Colorado) the

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[1] The Court is aware of the recent decision of the Colorado Supreme Court in *First National Bank of Fort Collins v. Rostek,* C-317, decided September 24, 1973, which overruled the previous choice of law rule in *tort* cases, replacing it with the "significant contacts" test. However, this Court will not presume to infer that Colorado *contracts* choice of law rule is rendered inoperative, until the State Supreme Court so rules.

Court held that since the contract was unilateral, it was completed upon the commencement of performance, *i.e.* in Michigan, when the transportation to Colorado commenced. *Id.* The justification for the result reached in Perryman was based on the Court's determination that a contract is made at the point in time at which an obligation is created. Thus the Court *cited with approval Bundy v. Commercial Credit Co.* 200 N.C. 511, 157 S.E. 860 (1931) in which it was held that a sales contract signed by the seller and sent to the buyer for his signature was made in the state in which the buyer signed.

Applying these rules to the facts before us, we must determine whether California or Australia is the place where the contract was made. Plaintiff asserts that as the signing took place by both parties in California, that is the place where the obligations of the parties became fixed, and hence the place where the contract was made. Defendants urge the Court to consider the last act needed to fix the obligation, and make the contract binding, to be the board ratification and affixing of revenue stamps to the agreement, which took place in Australia.

In *Perryman* the Colorado Supreme Court applied the definition of a contract contained in 17 C.J.S., *Contracts,* §1,a,p. 310, which says:

> "A contract is an agreement which creates an obligation. Its essentials are competent parties, subject matter, a legal consideration, mutuality of agreement, and mutuality of obligation." 307 P.2d at 810.

The Court is of the opinion that under this definition, the contract in question was made in California. While it is true that we must analyze the elements of the contract, for purposes of determining its validity, under the substantive law of the jurisdiction selected by applica-

tion of Colorado choice of law rules; before we can apply that jurisdiction's substantive law we must make a preliminary analysis, under Colorado law, of what constitutes a contract so as to be able to properly apply Colorado's choice rules. Thus, *for conflict of laws purposes,* based on evaluation of the evidence presented, the Court concludes that these elements of a contract, under Colorado law, were satisfied at the signing in Los Angeles, California on May 1, 1967.

The parties to that signing manifested an intent to be bound and had reached a meeting of minds as to the terms to which they were bound. The contract terms were changed at the signing so as to take effect at the date of the signing (the term of the licenses, the date from which the exempted sales were to be calculated). Broinowski had come from Australia with the specific intent of finalizing, *once and for all,* the obligations of L&B and CMP after the years of delay and extensive exchange of correspondence. That finalization was effected at the contract signing in Los Angeles. [Additionally it should be noted that previous drafts of the contract had contained recitations providing that the contract was to be governed by Australian law, *which L&B had objected to and deleted*].

In *Kodekey Electronics v. Mechanex* C-2432, D. C. Colo. (May 31, 1972) *affd. Kodekey Electronics v. Mechanex* No. 73-13-3, 10th Cir. (October 11, 1972), this Court was required to determine the existence of a contract respecting trade secrets and covenants not to compete. This Court's holding therein seems especially appropriate to the situation here before us:

> "A contract is a legally binding promise or set of promises. The elements which are necessary to the formation of a contract are plurality of parties and

mutual intention to effect a legal relationship. They may be stated as follows:

1. A manifestation of mutual assent comprising:
   (a) An offer
   (b) Its acceptance
2. A legally valid consideration.
3. Parties who have legal capacity to enter into a contract.
4. A subject which is not illegal.

Using this criteria, the Court finds that a contract existed between the parties.

That there was an unquestionable meeting of the minds with regard to the terms of the contract is indicated by the volume of business transacted by these corporations and their course of dealings."

As to the question whether there was a contract between the parties, we answer in the affirmative. We are satisfied, on the evidence presented, that Broinowski had actual authority from the CMP board to negotiate changes in the contract and to bind CMP to the contract as modified. In addition, as general manager or chief executive officer of CMP, Broinowski was vested with authority to bind CMP in matters beneficial to the corporation and in the usual course of business. *See Skyland Food Corp. v. Meier,* 152 Colo. 517, 382 P. 2d 996 (1963); *New Mexico Potash & Chemical Co. v. Oliver,* 121 Colo. 268, 228 P. 2d 979 (1951).

As for the action of the CMP board, it appears from the evidence that this was a prerequisite to filing and having revenue stamps affixed to completed contracts under Australian law. Broinowski characterized the board's action as "authentication". Under Colorado law a require-

ment that a corporate contract be approved by the board, either under a charter or statutory provision, does not preclude corporate liability for the acts of one whom the corporation allows to control corporate business. *McCoy v. Pastorius,* 125 Colo. 574, 246 P. 2d 611 (1952).

For many years L&B had recognized the efficacy of the contractual relationship; further, in our view, it is for members of the CMP board to question lack of Broinowski's authority to act. This they have not done. We are not persuaded by the contention that the contract lacked statutory formalities.

Even if we treat the board's action of CMP as a ratification of an act for which Broinowski did not have actual authority, ratification relates back to the time of the agent's act, making that act retroactively authorized. *Poudre Valley Furniture Co. v. Craw* 80 Colo. 353, 251 P. 2d 543 (1926); *Restatement of the Law 2d Agency* §82 comment (c); Cary, *Corporations,* Appendix D., p. A-105.

The Court concludes that under the rule of *Perryman* and a consideration of the totality of the business dealings of the corporations, the contract was made in California, not Australia, and California law governs determination of the validity of the contract.

II.

VALIDITY OF THE CONTRACT

Defendants assertions of the contract's invalidity are grounded on three main arguments; a failure of consideration; a lack of mutuality; and a provision of Australian law which renders the contract void *ab initio.*

The asserted failure of consideration is two-pronged. First it is claimed that CMP gave L&B nothing of value under the contract except information which was available in the public domain. Second it is claimed that the royalty payments recited in the contract constitute illusory consideration, due to fatal defects in specificity regarding the exchange rates applicable to such payments. (Additionally, defendants claim that L&B was motivated by a mere ethical or moral sense of obligation on the part of Charles towards CMP, and that this cannot constitute good consideration.)

Under California law, consideration is defined in Section 1605, California Civil Code as follows:

> "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is good consideration for a promise."

Defendants cite Williston on *Contracts,* 3d Ed. §115 for the proposition that:

> ". . . an idea lacking novelty and originality and universally known, whether or not technically sufficient to serve as consideration will not readily be regarded as requested by a promisor as the consideration for his promise."

This clearly is not applicable to the situation before us. If the "Rainline" system were "universally known" why did L&B desire to receive the plans and "know-how" necessary to manufacture the irrigation units in question? CMP provided good consideration for the royalty agreement by sending plans, design features and "know-how" to L&B. Further, Charles was an experi-

enced businessman, whose company had engaged in international transactions before the CMP venture. If the information which L&B received was readily available elsewhere, and not necessary for the development of the "Raincat", why did Charles and L&B enter into the agreement at all? The "know-how" provided by CMP, the in-line control system, the trussing design for pipe support, were clearly benefits to L&B conferred by CMP and good consideration within the meaning of §1605.

The fact that design features and other information which L&B received was readily available elsewhere, or was not novel, is not an element in the determination of whether requisite consideration was present. A requirement of "novelty" is not an element in trade secret cases, let alone a licensing agreement of design features and "know-how" as here presented.

In trade secret cases, so long as a process or design confers a competitive advantage and can not be readily duplicated there need not be any "novelty". Novel or not, a process, design or trade secret may still require a considerable investment and is a commercially valuable asset. Under its licensing agreement, plaintiff furnished L&B "know-how", design information and other information. Valid and adequate consideration as a basis of the contract is present.

We adhere to the view that plaintiff need not establish "novelty" to form the basis of sufficient consideration.

In analogy to trade secret cases (requiring greater proof by plaintiff than required in licensing and "know-how" cases) plaintiff need not establish novelty requisite to patentability and so-called novelty could consist of no more claim than "mechanical improvements that a good mechanic can make."

The fact, if it be a fact, that the information was available in the public domain does not alter our view.

Plaintiff owned and possessed something of value, desired by L&B in furtherance of L&B business activity. Plaintiff's design information and "know-how" (in combination) afforded L&B a competitive advantage in the United States and was so recognized by them.

Again turning to the trade secret field (with a higher degree of proof imposed on a plaintiff), a trade secret can exist in combination of components, each of which, by itself, is in the public domain, but unified process, design and operation in a final combination affords a competitive advantage and is a protectable secret. *Imperial Chemical Industries Ltd. v. National Distillers and Chemical Corp.*, 342 F. 2d 737 (2nd Cir. 1965).

As to the exchange rate argument, and the assertion that the contract is fatally defective for lack of specificity, reference to the course of conduct of the parties defeats this contention. The royalties paid by L&B, in American dollars at Los Angeles, and their acceptance by CMP evidence that the fatal defect urged by defendants is itself illusory. No objection was raised by either party, from the date of the signing to the termination by L&B in 1970, to the terms of payment of royalties. Indeed the contract was performed to the satisfaction of both parties until after the Smith takeover of L&B. Charles and Broinowski were not naive in the ways of international trade; they were experienced world-wide entrepeneurs. While not lawyers, they were nonetheless businessmen who knew the nature of the agreement into which they were entering, and had no difficulty manifesting their understanding of the royalty terms through their respective performance and acceptance thereof.

Finally, in regard to defendants' contention that L&B was motivated by mere moral obligation in entering into the contract, we have already found that the consideration received by L&B was real and tangible benefit in the form of "know-how" and technical assistance. But even were we to hold that the only consideration passing to L&B was the pre-existing moral obligation which Charles felt based on the "gentlemen's agreement" which pre-dated the written contract, under California law such an obligation is good consideration. California Civil Code Section 1606 provides:

> ". . . a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

Defendants also contend that there was an absence of mutuality, or a mutual mistake in the contract, in as much as L&B entered into the contract with the belief that the contract was a cross-licensing agreement, with the consideration for each grant of license being the expected receipt of royalty payments from the other party. The contract, on its face does not support this contention. Paragraph 8 of the May 1, 1967 contract provides:

> "*If and when CMP shall adopt and use* any of the original and novel designs or features (except those of CMP already contained in and the subject of patent or patent applications detailed in the first recital hereto [the center point standpipe of the system] used by the American Company in the manufacture of its "Raincat" . . . CMP shall, during the continuance of the license hereby granted, pay quarterly . . . a royalty of 2 & ½% . . . " *Emphasis added.*

Clearly this language indicates that the use of L&B ideas by CMP, and royalty payment therefore, was a

future possibility, not a contractual certainty. The conditional nature of CMP's obligation, coupled with the above determination that the consideration for L&B's obligation to pay royalties was the past technical assistance received militates against an inference that L&B thought the contract provided that cross royalty payments constituted the contract's consideration.

The final argument advanced by defendants is that the contract is violative of the currency regulations of the Reserve Bank of California Civil Code Section 1599 further provides:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

The case law in California manifests a desire on the part of the courts of that state to "strain to put such a construction upon the covenant so as to save it in part." *Edwards v. Mullin* 30 P. 2d 997, at p. 998 (1934). *Accord: Ury v. Jewelers' Acceptance Corp.* 38 Cal. Rptr. 376 (1964); *Bohman v. Berg* 256 P. 2d (1960).

Of course, it should be noted that these cases relate to the severability of a contract provision invalid under *California* law. The issue here presented is one of invalidity by virtue of Australian law. Pursuant to Rule 44.1, Fed. R. Civ. P., the Court takes notice of the case of *T. M. Duche & Sons (U.K.) v. Walworth Industries (Aust.) Pty.,* 1962 S. R. (N.S.W.) 165 (1958) [an opinion of the highest court of New South Wales, the Australian State in which Sydney is located]; the court held that "Regulation 8 [of the Reserve Bank] appears to me to be directed only to acts done or proposed to be done in Australia". at p. 173. Thus, the extra-territorial

effect of Regulation 8, as regarding a contract made in the United States is doubtful under Australian law. Defendant's expert witness on Australian law, Mr. King, an Australian lawyer, testified to this effect in his deposition.

Finally, even if the the regulation did apply to that portion of the contract requiring the conditional payment of royalties by CMP to L&B, CMP has received effective retroactive approval from the Reserve Bank. In a letter dated February 23, 1971, the Bank stated:

> "However, since the agreement would have received our authority had this been sought at the appropriate time, in this instance we are willing to treat the agreement as though the requisite authority had been received."

Great deference and persuasion should be afforded to interpretation by an agency charged with the duty of carrying out statutory mandates.[2]

We conclude that the Australian currency regulation does not operate to render the contract of May 1, 1967 void *ab initio,* and that the contract is valid and enforceable under California law. To hold otherwise, we would have to find that the carefully modified written instrument signed by the parties in Los Angeles on May 1, 1967, is no contract at all for reasons that amount to a determination that Charles and Broinowski did not know what they were doing on that date. The evidence does not support such a conclusion.

Defendants also contend that L&B paid CMP $65,000 as an erroneous gratuity, since L&B had received nothing

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[2] *National Indian Youth Council et al. v. Bruce et al.* No 73-1168, 10th Cir. (Sept. 21, 1973); *Udall, Secretary v. Tallman* 380 U.S. 1 (1965); *Garcey v. Freeman,* 397 F. 2d 600 (10th Cir. 1968).

of value before and in return for the payment of this money. Finally, defendants wish us to characterize the formal technicalities precedent to the filing of completed contract in Australia as the "last act" of the formation of the contract so that Australian law can be applied to invalidate the contract. This last assertion is especially interesting as the provision of Australian law hoped by defendants to effect the contract's invalidation has no extra-territorial effect, and moreover was waived in this case by the Australian body charged with its enforcement. To uphold defendants' contention, the Court is of the opinion that it would require us to deviate from persuasive facts.

The contract is valid and until this litigation was so recognized by the parties. For example Defendants Exhibit A, page 00014, in a letter dated December 15, 1969 from L&B (per R.S. Charles) to John Broinowski (CMP) wherein L&B requests "reconsideration of the terms of the agreement and its modification" in regard to amount of royalties on a graduated scale of business. Broinowski responded to the letter on March 3, 1970 (Defendants Ex. A., page 00012). This exchange of correspondence clearly reflects the existence of a valid contract. No dispute on critical terms or interpretations of contract provisions ever surfaced prior to institution of this litigation.

III.

THE TERMINATION

Paragraph 11 of the contract states the term of the licenses and provides for the termination of the contract. As above mentioned, this paragraph was modified by

Charles and Broinowski in their pre-signing negotiations. As modified, the paragraph reads:

> "The licenses herein granted shall be and remain in effect for the term of fifteen years from the [at this point the text of the contract is struck through and an insertion is typewritten above the crossed out text] date hereof. [further crossed out text] and thereafter from quarter to quarter unless terminated by either party giving the other party three months' notice in writing." [sic]

The only problem presented upon a reading of this paragraph is the insertion of a period after the phrase "date hereof.". Defendants contend that the effect of this punctuation mark is to create two separate terms for the duration of the license agreement, a fifteen year term and an alternative quarterly term subject to unilateral termination. We believe that to accept this interpretation would be to twist the plain meaning of the provision as written. The deleted portion of the text is part of one sentence which concludes with the phrase beginning "and thereafter". What was deleted was a long phrase providing that the agreement would be in effect from October 1, 1965 *or* the life of any patents granted to the two companies. The parties decided to replace this measure of the life of the licenses with the simple period of fifteen years from the date of signing, dropping any reference to patent life. What the modified language says is that the licenses are to remain in effect for fifteen years from May 1, 1967, and then from quarter to quarter, subject to unilateral termination, after May 1, 1982.

The only other reference to termination contained in the contract is to be found in paragraph 15, which says:

> "Either party may, at its option, cancel the license hereby granted by it upon thirty days' written notice

> to the other party of the other party's failure to pay the royalties becoming due as hereinbefore provided unless such other party has paid such royalties during such thirty day period."

Clearly this provision contemplates a mechanism by which the party to whom royalties are due may terminate the license for which royalties are due upon the non-payment of those royalties. Thus upon thirty days' notice to the defaulting party the non-defaulting party may terminate.

Neither provision authorized the termination by L&B of October 28, 1970. The unilateral termination authorized by paragraph 11 is only operative after May 1, 1982, and the default termination provided for in paragraph 15 is inapplicable to the facts before us. CMP was not in default on royalty payments to L&B, as the conditional obligation for CMP to pay royalties to L&B had not arisen.

Defendants based their termination, repudiation and rescission upon the alternative ground that the contract was void *ab initio* under Australian law, but our discussion of that point above leads to the conclusion that this was not a proper ground for such action by L&B, since the Australian law did not render the contract void. We must conclude therefore that L&B's termination was not authorized by the terms of the contract and their rescission or repudiation was not proper. Therefore the Court finds that the contract of May 1, 1967, is still in force, valid and binding upon the parties.

IV.

PRESENT LIABILITY

The only issue remaining is a determination of which defendant is liable to CMP for L&B's royalty obligation.

Paragraph 17 of the May 1, 1967 contract provides:

> "This agreement shall enure [sic] for the benefit of and be binding upon the respective successors and permitted assigns of the parties hereto."

By contract dated September 1, 1969, Mr. Robert Charles and his brother John Charles sold their stock in L&B to Smith. [185,292 of the 351.335 shares outstanding, or a controlling interest in L&B]

On October 12, 1971, L&B sold all assets relating to the manufacture and sale of "Raincat" to I&P. Paragraph 7.3 of that contract says:

> "L&B acknowledges it has an agreement with CMP of Sidney [sic] Australia dated May 1, 1967, which allegedly obligates L&B for the payment of royalties on the manufacture and sale of Raincat Irrigation Systems. L&B contends said agreement is not binding on it and has so notified CMP, and although a claim for the payment of royalties under said agreement has been made by CMP against L&B, such claim has not been pursued and may have been abandoned. L&B agrees to indemnify and save Irrigation harmless of and from any and all claims made by CMP based upon breach of said agreement or otherwise, including the payment of any damages, royalties, or other awards which may be made against I&P as the transferee or assignee of and successor to L&B of the right to manufacture and sell the Raincat Irrigation Systems by any court, administrative body, administrative board or other tribunal. *L&B agrees to indemnify and save Irrigation harmless of and from any and all claims made by CMP based upon breach of said agreement or otherwise,* including the payment of any damages, royalties, or other awards which may be made against I&P as the transferee or assignee of and successor to L&B of the right to manufacture and sell the Raincat Irrigation systems by any court, administrative body,

administrative board or other tribunal. L&B agrees to indemnify and save I&P harmless of and from all costs and expenses incurred by I&P in the defense of any such claims suits or proceedings." *Emphasis supplied.*

On February 17, 1972 Smith sold to General Signal Corporation, a New York corporation, 360,961 shares of the then-outstanding 364,335 shares of L&B stock. Paragraph 2.20 of the contract of sale provides:

"That L&B has disposed entirely of its business of manufacturing and selling "Raincat" systems as well as all obligations or liabilities in connection therewith, and that *A. O. SMITH will indemnify and hold L&B harmless against all claims, including but not limited to the lawsuit filed by Sims Consolidated Ltd. against L&B (among others) being Civil Action No. C-3632 in the U.S. District Court for the District of Colorado,* based upon L&B's previous operation of the "Raincat" business other than claims which are limited to the performance of vertical turbine pumps manufactured by L&B." *Emphasis supplied.*

Milton Morgan, Group Vice President for Smith at the time of its purchase of L&B, testified that Smith was aware, at the time of the purchase, of the contract between L&B and CMP of May 1, 1967. As a result, Smith was aware of the provision of paragraph 17 of the CMP agreement relating to successors and assigns being bound thereby. Further, in *Citizens Suburban Co. v. Rosemont Development Co.* 53 Cal. Rptr. 551 (Cal. App. 1966) the court held that a contract provision reciting that it is binding on successors and assigns avoids the necessity of an assumption of those contract obligations by an assignee.

L&B remained liable on the May 1, 1967 contract after the controlling stock was sold to Smith. Smith recog-

nized this by agreeing to the indemnity provisions in the contracts of transfer to I&P and General Signal. As a result Smith is liable to CMP for the royalty payments due from L&B under the May 1, 1967 contract from June 30, 1970 until the sale of the "Raincat" business to I&P on October 12, 1971. In addition Smith is liable to I&P, by virtue of the indemnity clause in the contract of sale of the "Raincat" business, for the royalties due CMP from I&P on "Raincat" sales from October 12, 1971 to date. General Signal, the present owner of L&B is indemnified by Smith as well, but as General is not a party here, and in fact has nothing to do with the "Raincat" business, General has no obligation to CMP.

V.

JUDGMENT AND ORDER

On the principal complaint, we find issues joined in favor of plaintiff and against the defendants.

IT IS HEREBY ORDERED that Judgment enter for plaintiff and against defendants on the complaint as follows:

(1) The contract of May 1, 1967 is valid, enforceable and binding on Sims Consolidated Ltd., Layne and Bowler Pump Co., A. O. Smith Corporation and Irrigation and Power Inc.

(2) A. O. Smith Corporation is liable to Sims Consolidated Ltd. for royalties on sales of "Raincat" irrigation systems from July 1, 1970 to October 12, 1971.

(3) Irrigation and Power is liable to Sims Consolidated Ltd. for royalties on sales of "Raincat" irrigation systems from October 12, 1971 to date.

(4) A. O. Smith is liable to Irrigation and Power for royalties due Sims Consolidated Ltd. on "Raincat" sales from October 12, 1971 to date, by virtue of the indemnity clause in their contract of October 12, 1971.

(5) The Court retains jurisdiction as to the question of damages and accounting as prayed for by plaintiff pending a determination of royalties due plaintiff on "Raincat" sales since July 1, 1970.

(6) Before December 1, 1973, counsel for defendants are to file with the Court an accounting of all sales of "Raincat" irrigation systems from July 1, 1970 to date, and a statement of the amount of royalties due Sims Consolidated Ltd. thereon; before January 1, 1974 counsel for plaintiff's are to file a statement on said accountings and computations of royalties together with proposed findings of fact and conclusions of law on said issues. Before January 21, 1974, defendants are to file a reply together with proposed findings of fact and conclusions of law on said issues.

A hearing on damages and accounting is set for Thursday, February 21, 1974 at 9:00 a.m. in Courtroom D., United States Courthouse. A supplemental pretrial on questions of damages and accounting reflecting exhibits, witnesses and other necessary matters shall be held on Thursday, January 31, 1974 at 9:00 a.m. in Courtroom D., United States Courthouse.

Counsel are directed to endeavor to agree on a supplemental pretrial order.

(7) Assessment and award of costs is reserved.

(8) The counterclaim of defendants against Sims Consolidated Ltd. for return or refund of royalties paid prior to July 1, 1970 is DISMISSED; issues on the counter-

claim are joined in favor of plaintiff and against defendants.

(9) Jurisdiction is retained by this Court for the purpose of entry of such further orders and directions as may be necessary or appropriate for the construction or carrying out of the herein order, or of any of the provisions hereof and for the enforcement of compliance herewith.

This opinion contains and shall constitute the findings of fact and conclusions of law required by Rule 52, Fed. R.Civ.P.

DATED at Denver, Colorado, this 31 day of October, 1973.

BY THE COURT:

/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

ENTERED
ON THE DOCKET
NOV 2 1973
BY JAMES R. MANSPEAKER
DEP. CLERK

FILED

JUN 24 1975

Howard K. Phillips, Clerk, United States Court of Appeals, Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1732

SIMS CONSOLIDATED LIMITED,

Plaintiff-Appellee,

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado Corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Defendants-Appellants.

Appeal from the United States District Court for the District of Colorado (D.C. No. C-3632)

Francis C. Browne, Washington, D.C. (Of Counsel: Edward T. Colbert, Washington, D.C. and W. David Pantle, Denver, Colorado) for Appellee.

John R. Trigg, Denver, Colorado, and James N. Johnson, A. O. Smith Corporation, Milwaukee, Wisconsin, for Appellants.

Before HILL, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Defendants below appeal from an adverse declaratory judgment order which upheld the validity of a contract and assessed royalty damages of $95,100.76. A summary of the pertinent facts will facilitate our review.

Plaintiff Sims Consolidated, Ltd. (Sims) is an Australian corporation based in Sydney, Australia. In 1970, via a merger, Sims became successor in interest to Consolidated Metal Products (CMP), an Australian corporation. Prior to its merger with Sims, CMP had purchased another Australian corporation, Grasslands Pty., Ltd. (Grasslands). After the merger Grasslands became a wholly owned subsidiary of Sims.

Defendant Layne and Bowler Pump Company (L & B) is a deep well turbine pump company which was acquired by defendant A. O. Smith Corporation (Smith) in 1969 pursuant to a stock buyout. In 1971, defendant Irrigation and Power Equipment, Inc. (I & P) purchased assets of L & B relating to the manufacture of L & B's irrigation system.

In 1960, R. S. Charles (Charles), President of L & B, visited Australia in an effort to extend L & B's business in foreign lands. As a result of this trip, L & B associated with Grasslands in their pump business. (At this time J. H. Broinowski, Managing Director of CMP, related to Charles that the letter of intent for the joint venture was subject to approval by the CMP board of directors). Although Charles observed portions of Grasslands' center pivot irrigation system during his visit, the joint venture related only to the manufacture and sale of pumps.

A year later, in 1961, L & B was contacted by one of its pump dealers who had become a dealer for a center pivot irrigation system. This system, however, was having operational problems and Charles contacted CMP

for sales literature and other information which explained how Grasslands' "Rainline" center pivot system worked. Thereafter, L & B became a Grasslands dealer and ordered ten (10) "Rainline" units. At this time Charles told Grasslands that if it was more economical to manufacture their system in the United States, L & B would pay a royalty.

The first "Rainline" units imported by L & B did not work in the United States because the topography and soil composition within the States differed substantially from that of Australia. Also, a patent infringement suit against L & B by an American irrigation system manufacturer required that an electrical power drive be substituted for the hydraulic drive of the original "Rainline". Notwithstanding these problems, by 1966 L & B was marketing its own center pivot irrigation system under the name of "Raincat".

During L & B's patent infringement suit and again in 1963, CMP pressed Charles for a written royalty agreement. This contract, which is the basis of this action, was finally consummated on May 1, 1967 in Los Angeles, California. At that time two copies of the contract were executed with Broinowski signing on behalf of CMP and Charles and Bower (L & B's President) signing on behalf of L & B. Broinowski's copy was forwarded to Sydney for authentication by the CMP Board on May 16, 1967.

Under the contract L & B was to pay a 2½% royalty to CMP on its "Raincat" sales in excess of its first $1,920,000 sales. In return, L & B was afforded: (1) the right to use all "improvements, developments and patented features and designs developed — by CMP in connection with "Rainline" equipment"; (2) an exclusive

franchise for the manufacturing and sale of "Rainline" in the United States and Canada; and (3) the mutual exchange of research with CMP. The contract further provided that if CMP utilized any "Raincat" features in the development of its "Rainline", it would pay a 2½% royalty to L & B.

In 1968 Charles sought relief from the contract which was denied by CMP. When Smith purchased control of L & B in 1969, Charles was requested to again confer with CMP relative to relief from the contract. Relief was denied.

In 1969 the exempted sales of $1,920,000 were reached. Thereafter, until June 30, 1970, L & B paid CMP royalties of $64,147.04. On October 28, 1970, general counsel for Smith, writing on behalf of L & B, notified CMP that L & B was rescinding and terminating the contract. Subsequent thereto, L & B sold its irrigation assets to I & P on October 12, 1971. Under the terms of the sale, L & B agreed to indemnify I & P against any liability on the May 1, 1967 contract with CMP. In 1972 Smith sold L & B to General Signal Corporation under a contract whereby Smith agreed to indemnify L & B against any liability arising from the May 1, 1967 contract with CMP.

Upon the repudiation of the contract, Sims filed suit on December 20, 1971, seeking: (1) declaratory judgment of enforceability of the contract; (2) an accounting for royalties; and (3) injunction for business tort.[1] After considerable pre-trial "sparring", trial on the issue of liability was set for May 22, 1973. On May 17, 1973, counsel were notified that trial was being continued because no judge was available. At this time one witness

[1] Subsequently dropped.

had arrived from Australia, one was en route from Australia, and a third witness was about to depart from Australia.

Therefore, on May 17, 1973, counsel met informally with the Chief Judge and decided that the only alternatives to a continuance would be the appointment of a Master or the taking of all testimony via depositions. At this time, the parties, with the approval of the Chief Judge, agreed to present their evidence via videotaped depositions augmented by written transcripts of the depositions. The record clearly indicates that although both counsel were displeased and reluctant to proceed by depositions, both agreed to do so, and no formal objections were made or raised as to this procedure. Trial depositions were thereafter videotaped on May 21, through May 23, 1973.

On October 31, 1973, the Trial Court, after reviewing all the depositions, transcripts, evidence and briefs, and after hearing oral arguments on the issue of liability, entered a Memorandum Opinion and Order upholding the contract and requiring an accounting of royalties due to date. Final judgment was entered for Sims on July 31, 1974.

In upholding the contract the Trial Court held that: (1) the contract was finalized in California and that the obligations of the parties were fixed as of that time; (2) the contract was valid under the laws of California; (3) the contract could be unilaterally terminated only after May 1, 1982; and that (4) Smith was liable to CMP for the royalty payments due from L & B under the contract.

On appeal appellants contend, inter alia, that: (1) compelling trial by deposition was error; (2) there was

no contract because of lack of consideration; and that (3) Australian law controls and renders the contract void.

I.

Appellants contend that the Trial Court erred by compelling trial by deposition. Appellants contend that: docket conditions, not the parties compelled the trial by deposition; the videotape trial was undisciplined; the record is defective and prejudicial to the parties; videotaping testimony should be undertaken only with proper safeguards; they did not waive the right to appeal the use of the depositions; and that the Trial Court's failure to consider all the evidence resulted in numerous erroneous findings of fact.

Appellants contend that they were compelled to trial by deposition and that such a trial should be undertaken only with proper safeguards. They contend that the subject trial was undisciplined. We cannot agree.

Initially, appellants were not compelled to trial by deposition. Rather, they were afforded the opportunity of having the case referenced to a Master *or* trial by deposition. Under Rule 53(b) Fed.R.Civ.P. 28 U.S.C.A. reference to a Master:

> - - - shall be the exception and not the rule. - - - in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Reference to the Master therefore was proper not only because the case involved an "accounting" and "difficult computation of damages", but also because of the "exceptional condition" that one witness had arrived from

Australia, one was en route, and a third was departing for the United States.

Appreciating that reference to a Master is a matter within the Trial Court's discretion, La Buy v. Howes Leather Co., 352 U.S. 249 (1957), Harrington v. Sorelle, 313 F. 2d 10 (10th Cir. 1963), Bradshaw v. Thompson, 454, F. 2d 75 (6th Cir. 1972), cert. denied 409 U.S. 878 (1972), reviewable by the Court of Appeals, Wilver v. Fisher, 387 F. 2d 66 (10th Cir. 1967), we hold that under the facts of this case the Trial Court did not err in determining that reference to a Master was proper. Accordingly, the Trial Court did not err in affording the parties the opportunity of opting between reference to a Master and trial by deposition.

Trial by deposition, under the facts of this case, and in view of the mutual consent of counsel, was proper. Furthermore, contrary to appellants' contentions, appellants waived their right to challenge this issue on appeal, and they further waived their right to contest the manner in which the depositions were taken. They clearly failed to comply with Rule 30(c) Fed.R.Civ.P. 28 U.S.C.A. which provides in part:

> All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Nor did they comply with Rule 32(d)(3)(B) Fed.R. Civ.P. 28 U.S.C.A. which provides in part:

> Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

In view of the unusual facts of this case, including the arrival of witnesses from Australia, counsel's consent to trial by videotaped depositions, coupled with an absence of any formal objection below, we hold that the trial by deposition did not give rise to error. We are puzzled by appellants' reply-brief argument, citing to Wingo v. Wedding, 418 U.S. 461 (1974), in support of the proposition that they did not waive their right to a trial. *Wingo* is clearly distinguishable since as was noted, *supra,* appellants voluntarily opted to trial by deposition. Their voluntariness is evidenced by this recital in their Brief on Appeal:

> Videotaping was selected from the Chief Judge's decree because of the value inherent (in defendants' view) of allowing the trial court to, observe the trial on film rather than read a magistrate's written record.

Appellants voluntarily chose trial by deposition as part of their trial tactics. Having so elected, they cannot now allege denial of their right to trial.

Appellants also argue that the failure of the Trial Court to consider all the evidence resulted in erroneous finding of fact. It is uncontested that the depositions of James Johnson, Clark Bower, Bernard Gillman, and

John Allwood, none of which were videotaped, had apparently not been opened by the Trial Court prior to the entry of judgment. In support of this contention, appellants cite to nine (9) specific findings of the Trial Court, all of which are allegedly erroneous, purportedly the direct result of the Trial Court's failure to consider the four (4) aforementioned depositions.

Having reviewed the nine allegedly erroneous findings it is clear that appellants have engaged in legal mental gymnastics in an effort to discredit the findings of the Trial Court. No specific showing of prejudice was made. Error if present was harmless, and if present can not be said to be predicated upon the Court's failure to consider the aforementioned depositions. Though we cannot condone the Trial Court's apparent failure to consider the four depositions in question, the allegations of error advanced by appellants are without substance or persuasion.

The handling of depositions is vested within the sound discretion of the court. Campbell v. Barnett, 351 F. 2d 342 (10th Cir. 1965). Exclusion of evidence, though improper, need not always give rise to the reversible error. Hardy Salt Company v. Southern Pacific Transportation Company, 501 F. 2d 1156 (10th Cir. 1974). Furthermore, the exclusion of proffered evidence is not grounds for reversal unless it can be reasonably said that the evidence was competent and that its exclusion precluded a fair trial based on all competent evidence. Ottinger v. Siegfried, 349 F. 2d 647 (10th Cir. 1965). It is not error to refuse to admit into evidence, or as here - - - to refuse to consider depositions that do not add anything of probative value which has already been developed. Fenstermacher v. Philadelphia National Bank, 493 F.

2d 333 (3rd Cir. 1974). We hold that upon considering the totality of the facts of this case, constituting substantial evidence in support of the Trial Court's holding, that reversible error did not occur from the Court's apparent failure to read the depositions verbatim. Cf. Salesman v. Witt, 466 F. 2d 76 (10th Cir. 1972). Our independent review of the subject depositions supports this conclusion.

II.

Appellants contend that there is no contract because of lack of consideration. In support thereof appellants theorize that: the contract fails because of mistake of the parties in creating future consideration; the contract is illusory because it fails to contemplate basic terms; and that moral consideration is insufficient to support the contract. These theories, advanced in defiance of logic and without support of cogent authority, do not comport with the facts of this case. The Trial Court found — and we concur — that a valid contract existed between the parties. In upholding the validity of the contract the Trial Court said:

> The asserted failure of the consideration is two-pronged. First it is claimed CMP gave L & B nothing of value - - - . Second it is claimed that the royalty payments - - - constitute illusory consideration - - - .
>
> * * * *
>
> - - - If the "Rainline" system were "universally known" why did L & B desire to receive the plans and "know how" necessary to manufacture the irrigation units in question? CMP provided good consideration for the royalty agreement by sending plans, design features and "know how" to L & B. Further, Charles was an experienced business man,

whose Company had engaged in international transactions before the CMP venture.

* * * *

As to the exchange rate argument, and the assertion that the contract is fatally defective for lack of specificity, reference to the course of conduct of the parties defeats this contention. The royalties paid by L & B, in American dollars at Los Angeles, and their acceptance by CMP evidence that the fatal defect urged by defendants is itself illusory. No objection was raised by either party, from the date of the signing to termination by L & B in 1970, to the terms of payment of royalties. Indeed, the contract was performed to the satisfaction of both parties until after the Smith takeover of L & B. Charles and Broinowski were not naive in the ways of international trade; they were experienced world-wide entrepeneurs. While not lawyers they were nonetheless businessmen who knew the nature of the agreement into which they were entering, and had no difficulty manifesting their understanding of the royalty terms through their respective performance and acceptance thereof. (Emphasis supplied).

Appellants' argument that the contract lacked consideration is, as noted by the Trial Court, illusory. The speculative arguments of appellants give rise, at best, to the possibility that there was not a meeting of minds. Such a speculative conclusion, however, would be diametrically opposed to the facts which establish the formation of a contract, its execution and continued vitality, and the unilateral termination and repudiation thereof by appellant Smith.

The appellate court cannot provide appellants a trial de novo. Hinde v. Hot Sulphur Springs, Colorado, 482 F.2d 829 (10th Cir. 1973); Marken v. Goodall, 478 F.2d

1052 (10th Cir. 1973); Hamilton v. Miller, 477 F.2d 908 (10th Cir. 1973); Dailey v. City of Lawton, Oklahoma, 425 F.2d 1037 (10th Cir. 1970). And in the absence of clear error, we will not reverse findings of a trial court on appeal. Beltronics, Inc. v. Eberline Instrument Corporation, 509 F.2d 1316 (10th Cir. 1974); Permian Corporation v. Armco Steel Corporation, 508 F.2d 68 (1974); Prisbrey v. Noble, 505 F.2d 170 (10th Cir. 1974); Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974). Based on all of the facts in this record, we concur with the Trial Court's conclusion that a valid contract existed, supported by adequate consideration.

III.

Appellants contend that Australian law controls the subject contract and renders it void. At the outset we note this to be a rather unique argument since all the appellants are domestic, United States corporations; L & B is a California corporation, and the contract was entered into in California. Appellants argue that because the contract was not final until approved by the CMP Board on May 16, 1967 in Sydney, Australia, that Australian law controls. They argue, accordingly, that under Australian law the contract was void as violative of the currency regulations of the Reserve Bank of Australia. We disagree.

The Trial Court found that authentication of the contract under Australian law was, for the most part, ministerial:

> As for the action of the CMP Board, it appears from the evidence that this was a prerequisite to filing and having revenue stamps affixed to completed contracts under Australian law.

> Broinowski characterized the Board's action as "authentication".
>
> * * * *
>
> For many years L & B had recognized the efficacy of the contractual relationship; further, in our view, it is for members of the CMP Board to question lack of Broinowski's authority to act. This they have not done.

The Trial Court further correctly found that the contract was effectuated in and therefore controlled by the laws of California. This finding necessarily follows since it is undisputed that although previous drafts of the contract had provided that the contract be governed by Australian law, this proviso was removed and deleted upon L & B's objection. Under these conditions, the Trial Court did not err in holding that a valid contract was consummated in California. See page 22, *supra,* re clear error. The intent of the parties, at the time of the execution of the contract, reflects their desire that the law of Australia was not to govern.

IV.

We have carefully reviewed each of the other allegations of error raised by appellants and hold that they are singularly and collectively void of merit.

AFFIRMED.

Filed United States District Court
January 30, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED LIMITED, *Plaintiff,*

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation qualified as a foreign corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation doing business in the State of Colorado,

Defendants.

PRE-TRIAL ORDER

1. DATE AND APPEARANCES

The matter coming on for Pre-Trial Conference on January 5, 1973, the plaintiff appearing by Francis C. Browne of Browne, Beveridge, DeGrandi & Kline, Washington, D.C., and W. David Pantle of Dawson, Nagel, Sherman & Howard, Denver, Colorado. The defendants appearing by John R. Trigg of Yegge, Hall and Evans, Denver, Colorado. James N. Johnson, General Counsel for A. O. Smith Corporation, Milwaukee, Wisconsin has also entered an appearance for defendants.

* * *

13. TRIAL AND ESTIMATED TIME

Trial in this controversy is to the Court to begin May 22, 1973, and estimated time of trial is two to three days. The trial shall be limited to question of liability and any accounting, in the event of liability by any party, shall be reserved for subsequent trial.

DATED THIS 30 day of January, 1973.

BY THE COURT:

/S/ Sherman G. Finesilver
United States District Judge

[Approved by Counsel for Parties]

Filed United States District Court
Denver, Colorado, July 12, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED LIMITED, *Plaintiff,*

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation qualified as a foreign corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation doing business in the State of Colorado,

Defendants.

ORDER CONCERNING COMPLETION OF TRIAL

In the Pre-Trial Order entered in January, 1973, the case was set for trial on day certain in view of the fact that witnesses were to come from Australia to testify at trial, and the case was set for trial to the Court to begin May 22, 1973. On April 24, 1973, defendants made a Motion for Continuance and other matters, which was denied by Minute Order of the Chief Judge on May 3, 1973. Thereafter, on May 13, 1973, the defendants took the trial deposition by videotape in California of one of their principal witnesses.

On May 17, 1973, the Clerk advised the parties that the trial was being continued because no judge was available, due to other commitments. At that time, one witness had already arrived from Australia, another was on his way from Australia, and a third was about to leave Australia. On May 17, 1973, the attorneys for the parties conferred informally with the Chief Judge, and concluded that the only alternatives to continuance were either the appointment of a Master, or taking all testimony by depositions to be later submitted to the

Court. The parties, with the Chief Judge, agreed to proceed by trial on depositions, with certain other depositions to be completed within thirty days. The parties agreed to delay the exchange of their proposed Findings of Fact and Trial Briefs for one more day, which was done.

* * *

On May 23, 1973, counsel, together with representatives of the parties, conferred with Judge Finesilver, the Judge to whom the case has been assigned. At that time, there was discussion as to what the further procedure should be for completion of the trial, and the Court directed the parties to prepare an agreed Order establishing the procedure for completion of the trial. Now by the stipulation and agreement of the parties, it is

* * *

2. The Court may consider all depositions taken in this case, including depositions taken by videotape, as being the testimony of the witnesses at trial. The Court may read the transcripts of depositions or view the videotape, or both, as the Court sees fit. The Court, by approving this Order, is not establishing any precedent giving approval for videotape depositions, as the Court is concerned whether such form of testimony is suitable, and the counsel for the parties feel that the procedure was an unsatisfactory method by which to resolve this lawsuit.

* * *

DATED this 12 day of July, 1973.

BY THE COURT:
/S/ Sherman G. Finesilver
United States District Judge

[Approved by Counsel for Parties]

Filed United States District Court
Denver, Colorado, September 24, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED LIMITED,

Plaintiff,

vs.

IRRIGATION AND POWER EQUIPMENT, INC, et al.,

Defendants.

FURTHER STIPULATION AND ORDER CONCERNING COMPLETION OF TRIAL

COME NOW the parties, by their attorneys, and hereby stipulate as follows:

1. Informal conference was held in this matter on September 10, 1973 with the Court, counsel for all parties being present.

2. Because of the unavailability of any judge on May 22, 1973 when the case was set for trial, and the fact that witnesses had already arrived from Australia or were soon to arrive from Australia, the parties conferred informally with the Chief Judge, and concluded to proceed to trial on depositions by videotape, in addition to depositions previously taken. The parties conclude that such procedure was not entirely satisfactory. The transcripts of all depositions, including those also taken by videotape, have been prepared and filed with the Court. The parties have previously filed with the Court proposed

Findings of Fact and Conclusions of Law, and also trial briefs, based on the record made prior to May 22, 1973.

3. The Court shall consider as evidence in this case the following:

(a) The transcripts of all depositions taken in this case, namely the depositions of John H. Broinowski, Robert S. Charles, Jr., John Allwood, Alfred C. King, James N. Johnson, Bernard E. Grellman, A. Gordon Johnson, and Milton E. Morgan, including videotape recordations thereof where available.

* * *

(d) All exhibits offered by defendants, consisting of Exhibits A through R and V, and Exhibits Q1, AA, BB, and CC (King deposition), DD, EE, FF, GG, HH, II, and KK (Morgan deposition). Also 60 United States Statutes at Large, page 1401, Treaties in Force of January 1, 1964, pages 236-237, Treaties in Force of January 1, 1963, pages 231-232, Treaties in Force of January 1, 1962, page 232, Treaties in Force of January 1, 1961, page 220, Treaties in Force of January 1, 1960, page 210, and Treaties in Force of January 1, 1971 (to show provisions of Bretton Woods agreement).

* * *

[Stipulation of Counsel]

ORDER

The above Stipulation is hereby approved and made the Order of the Court.

DATED this 1 day of October, 1973.

BY THE COURT:

/S/ Sherman G. Finesilver
United States District Judge

FILED

United States District Court
Denver, Colorado

NOV. 9, 1973

JAMES R. MANSPEAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED LIMITED,

Plaintiff,

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation qualified as a foreign corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation doing business in the State of Colorado,

Defendants.

JUDGMENT

Pursuant to and in accordance with the Memorandum Opinion and Order signed by The Honorable Sherman G. Finesilver and filed on October 31, 1973, it is

ORDERED that judgment enter for Plaintiff and against Defendants on the complaint as follows:

1. The contract of May 1, 1967 is valid, enforceable and binding on Sims Consolidated Limited, Layne and Bowler Pump Co., A. O. Smith Corporation and Irrigation and Power, Inc.

2. A. O. Smith Corporation is liable to Sims Consolidated Limited for royalties on sales of "Raincat" irrigation systems from July 1, 1970 to October 12, 1971.

3. Irrigation and Power is liable to Sims Consolidated Limited for royalties on sales of "Raincat" irrigation systems from October 12, 1971 to date.

4. A. O. Smith is liable to Irrigation and Power for royalties due Sims Consolidated Limited on "Raincat" sales from October 12, 1971 to date, by virtue of the indemnity clause in their contract of October 12, 1971.

5. The Court retains jurisdiction as to the question of damages and accounting as prayed for by Plaintiff pending a determination of royalties due Plaintiff on "Raincat" sales since July 1, 1970.

6. Before December 1, 1973, counsel for Defendants are to file with the Court an accounting of all sales of "Raincat" irrigation systems from July 1, 1970 to date, and a statement of the amount of royalties due Sims Consolidated Limited thereon; before January 1, 1974 counsel for Plaintiff is to file a statement of position on said accountings and computations of royalties, together with proposed findings of fact and conclusions of law on said issues. Before January 21, 1974 Defendants are to file a reply together with proposed findings of fact and conclusions of law on said issues.

A hearing on damages and accounting is set for Thursday, February 21, 1974 at 9:00 o'clock a.m., in Courtroom D, United States Courthouse. A supplemental pre-trial on questions of damages and accounting reflecting exhibits, witnesses and other necessary matters shall be held on Thursday, January 31, 1974 at 9:00 o'clock a.m., in Courtroom D, United States Courthouse.

Counsel are directed to endeavor to agree on a supplemental pre-trial order.

7. Assessment and award of costs is reserved.

8. The counterclaim of Defendants against Sims Consolidated Limited for return or refund of royalties paid prior to July 1, 1970 is dismissed; issues on the counterclaim are joined in favor of Plaintiff and against Defendants.

9. Jurisdiction is retained by this Court for the purpose of entry of such further orders and directions as may be necessary or appropriate for the construction or carrying out of the herein order, or of any of the provisions hereof and for the enforcement of compliance herewith.

DATED at Denver, Colorado, this 9 day of November, 1973.

BY THE COURT:

/s/ Sherman G. Finesilver
Sherman G. Finesilver, Judge
United States District Judge

ENTERED
ON THE DOCKET
NOV. 14, 1973
JAMES R. MANSPEAKER
By KA
Deputy Clerk

FILED

United States District Court
Denver, Colorado

NOV. 9, 1973

JAMES R. MANSPEAKER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONCOLIDATED, LTD.,

Plaintiffs,

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation qualified as a foreign corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Defendants.

ORDER

THIS MATTER coming on for consideration by the Court on the Stipulation of the parties, and the Court having considered said Stipulation, and the Court agreeing that the Order of October 31, 1973 pertains only to a portion of the issues being litigated by the parties, and adjudicating fewer than all of the claims, rights and liabilities of the parties, and agreeing that it does not terminate the action as to all of the claims between the parties;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that no Motion for New Trial or Motion to

alter or amend a Judgment need be filed by any party until ten (10) days after the entry of the Judgment in this case at the conclusion and completion of the litigation between the parties on the damage issues.

BY THE COURT:
/s/ Sherman G. Finesilver
Judge Sherman G. Finesilver

9 Nov. 1973

ENTERED
ON THE DOCKET
NOV. 14, 1973

JAMES R. MANSPEAKER
By KA
Deputy Clerk

AUG. 2 - 1974

United States District Court
Denver, Colorado

JUL. 29, 1974

JAMES R. MANSPEAKER
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action C-3632

SIMS CONCOLIDATED, LTD.,

Plaintiff,

v.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a California corporation doing business in the State of Colorado; A. O. SMITH CORPORATION, a New York corporation doing business in the State of Colorado,

Defendants.

JUDGMENT

PURSUANT to and in accordance with the Findings of Fact, Conclusions of Law and Judgment on Accounting for Royalties, signed by Judge Sherman G. Finesilver and filed July 22, 1974, it is

ORDERED that Judgment enter in favor of plaintiff and against defendants, Layne & Bowler and A. O. Smith Corporation, said judgment to be joint and several, for royalties in the sum of $42,646.00, together with interest at the rate of 7% per annum in the total amount of $8,955.66, for a total of $51,601.66, plus interest hereafter at 6% per annum until paid. Of this total, $36,121.16 shall be paid directly to plaintiff, and $15,480.50 (the

30% withholding tax) shall be paid to the Internal Revenue Service.

ORDERED that Judgment is hereby entered in favor of plaintiff and against defendants, Irrigation and Power Equipment, Inc. and A. O. Smith Corporation, jointly and severally, for the sum of $41,036.99 for royalties and for the additional sum of $2,462.22 for interest, for a total of $43,499.21, for Raincat sales from October 12, 1971, through December 1, 1973, plus interest hereafter at 6% per annum until paid. Of this total, $30,449.45 shall be paid directly to plaintiff, and $13,049.76 (the 30% withholding tax) shall be paid to the Internal Revenue Service.

ORDERED that Judgment is hereby entered in favor of plaintiff for an accounting for payment of royalties to plaintiff due on later sales made by Irrigation and Power Equipment, Inc.

FURTHER ORDERED that defendant's Counterclaim be and is hereby dismissed.

DATED at Denver, Colorado this 29 day of July, 1974.

BY THE COURT:
/s/ Sherman G. Finesilver
SHERMAN G. FINESILVER, Judge
United States District Court

ON THE DOCKET
JUL. 31, 1974
JAMES R. MANSPEAKER
By PD
Deputy Clerk

JULY TERM — July 17, 1975

Before The Honorable Delmas C. Hill, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges.

SIMS CONSOLIDATED LIMITED,

Plaintiff-Appellee,

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado Corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Defendants-Appellants.

No. 74-1732

This matter comes on for consideration of the Petition for Rehearing filed by the appellant in the captioned cause.

Upon consideration whereof, it is the order of the Court that the petition for rehearing is denied.

A true copy

Teste

/s/ Howard K. Phillips
Howard K. Phillips, Clerk
U. S. Court of Appeals, Tenth Circuit

Janet R. O'Dell, Deputy Clerk

JULY TERM — JULY 30, 1975

Before The Honorable Delmas C. Hill, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges.

SIMS CONSOLIDATED LIMITED, *Plaintiff-Appellee,*

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado Corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Defendants-Appellants.

No. 74-1732
(D.C. No. C-3632)

A true copy
Teste

Howard K. Phillips, Clerk
U. S. Court of Appeals, Tenth Circuit

By Cheri Bloom, Deputy Clerk

The Court, in order to correct a clerical error, reissues its order of July 29, 1975, as follows:

This matter comes on for consideration of the appellants' motion for stay of mandate pending application for a petition for writ of certiorari in the captioned cause.

Upon consideration whereof, it is ordered that the mandate is stayed to and including August 28, 1975, pending the timely filing by appellants of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this Court shall have received notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

Howard K. Phillips, Clerk

EXHIBIT "A"

JULY TERM — JULY 29, 1975

Before The Honorable Delmas C. Hill, The Honorable William J. Holloway, Jr., and The Honorable James E. Barrett, Circuit Judges.

SIMS CONSOLIDATED LIMITED, *Plaintiff-Appellee,*

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Defendants-Appellants.

No. 74-1732
(D.C. No. C-3632)

Teste

Howard K. Phillips, Clerk
U. S. Court of Appeals, Tenth Circuit

Mary A. Sherman, Deputy Clerk

This matter comes on for consideration of the appellants' motion for stay of mandate pending application for a petition for writ of certiorari in the captioned cause.

Upon consideration whereof, it is ordered that the mandate is stayed to and including August 28, 1974, pending the timely filing by appellants of a petition for writ of certiorari in the Supreme Court of the United States. If, on or before that date, the Clerk of this Court shall have received notice from the Clerk of the Supreme Court of the United States that a timely petition for writ of certiorari has been filed in that Court, the stay of mandate shall continue until final disposition by the Supreme Court.

Howard K. Phillips, Clerk

Corrected by re-issue

Agreement

THIS AGREEMENT is made the First day of May 1967 BY AND BETWEEN CONSOLIDATED METAL PRODUCTS LIMITED of 8 Bridge Street, Sydney, in the State of New South Wales (hereinafter called "C.M.P.") of the one part AND LAYNE & BOWLER PUMP COMPANY of Puente Avenue, City of Industry, La Puente, California, in the United States of America (hereinafter called "The American Company") of the other part.

WHEREAS C.M.P. manufactures irrigation equipment and pumps certain of which are patented No. 227737 (No. 35541/58 including Cognate Application No. 40,166/58) and the subject of applications for addition to the aforementioned patent (No. 54205/65 dated 21st. January 1965 to cover the "in line" and "protection" switches and controls and the motor drive; and No. 419/66 dated 13th January 1966 being a modification to the original invention) in the Commonwealth of Australia as a "Mobile Irrigation Sprayer" issued in and applied for respectively in the name of its subsidiary "Machinery Specialties Pty. Limited" AND WHEREAS such equipment is operated by both water and electric power and is marketed under the name "Rainline" by a subsidiary of C.M.P. known as "Grasslands Pty. Limited". AND WHEREAS the name "Rainline" is protected as a *trade mark* registered under the Trade Marks Act in the Commonwealth of Australia in respect of mobile sprayers and parts also under the name of "Machinery Specialties Pty. Limited" AND WHEREAS C.M.P. has applied for and will pursue an application (No. 54206/65 dated 21st January 1965) for a completely independent and separate patent on the centre point (or stand pipe) adapted to feed water and electricity to the sprayer et alia in order to secure as wide protection as possible for C.M.P. AND WHEREAS C.M.P. has supplied units of certain of the above equipment to the American Company AND WHEREAS the American Company has developed the ideas incorporated in such units and is

manufacturing a self propelled sprinkling irrigation system using electric power only for propulsion AND WHEREAS such electric powered equipment is being produced and marketed in the United States of America and elsewhere by The American Company under the name "Raincat" AND WHEREAS the American Company has applied for United States patents on features of the "Raincat" developed as above and has registered the name "Raincat" as a *trade mark* in the United States AND WHEREAS it is the desire of C.M.P. to license The American Company to use any and all features and designs of the "Rainline" in connection with the manufacture by The American Company of the "Raincat" AND WHEREAS it is the desire of The American Company to license C.M.P. to use any and all features and designs of the "Raincat" in connection with the manufacture by C.M.P. of the "Rainline".

NOW IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:—

1. C.M.P. grants to The American Company the right and license to use in connection with the manufacture of the "Raincat" any and all features and designs of the "Rainline", including the right to so use all improvements, developments and patented features and designs developed in the future by C.M.P. in connection with the "Rainline" equipment. Information on all such improvements, developments and any applications for patents, either provisional or complete, when made by C.M.P. shall be forthwith communicated to The American Company for its use and information. The American Company may make applications for patents on said ideas and features in the United States and in other countries as it so desires. C.M.P. agrees that it will not license *any one* other than the American Company to use, manufacture, sell or deal in any of the features or designs of the "Rainline" equipment in the United States. and Canada.

2. The American Company grants to C.M.P. the right and license to use in connection with the manufacture of

the "Rainline" any and all features and designs of the "Raincat", including the right to so use all improvements, developments and patented features and designs developed in the future by The American Company in connection with the "Raincat" equipment. Information on all such improvements, developments and any applications for patents, either provisional or complete, when made by The American Company shall be forthwith communicated to C.M.P. for its use and information. C.M.P. may make applications for patents on said ideas and features in Australia as it so desires. The American Company agrees that it will not license *any one* other than C.M.P. to use, manufacture, sell or deal in any of the features or designs of the "Raincat" equipment in the country of Australia.

3. The American Company shall have and retain the exclusive right to manufacture, sell, market, hire, lease and deal with its "Raincat" irrigation equipment throughout the entire world. All orders received by The American Company for "Rainline" equipment shall be referred to C.M.P. for filling.

4. C.M.P. shall have and retain the exclusive right to manufacture, sell, market, hire, lease and deal with its "Rainline" irrigation equipment throughout the entire world. All orders received by C.M.P. for "Raincat" equipment shall be referred to The American Company for filling.

5. Subject to the provisions of Paragraphs 6 and 7 hereof, The American Company shall, during the continuance of the license hereby granted, pay quarterly, on the twentieth day following the end of each quarter, to C.M.P. a royalty of 2½% of the net invoice price of all sales of "Raincat" equipment made by it in the preceding quarter. The payment of said royalty shall be accompanied by a statement setting out the total of all sales invoiced in the quarter.

6. The royalty above mentioned shall not commence to be payable until after The American Company shall have

received the sum of 1,920,000.00. U.S. Dollars from sales made after October 1, 1965, of "Raincat" equipment as defined in Paragraph 7 hereof. [JHB says this is understood to be 1st May 1967.]

7. The above mentioned royalty shall be calculated only upon the net amount received from the sales of items connected with the "Raincat" equipment located from the pivot of the system to the end of the boom.

8. If and when C.M.P. shall adopt and use any of the original and novel designs or features (except those of C.M.P. already contained in and the subject of patent or patent applications detailed in the first recital hereto) used by the American Company in the manufacture of its "Raincat" equipment as disclosed by the patents or patent applications filed by the American Company, C.M.P. shall, during the continuance of the license hereby granted, pay quarterly, on the twentieth day following the end of each quarter, to the American Company a royalty of 2½% of the net invoice price of all those sales of "Rainline" equipment made by it in the preceding quarter incorporating the said novel designs or features separately invented by the American Company as mentioned above. The said royalty shall be calculated only upon the net amount received by C.M.P. from the sales of items connected with the "Rainline" equipment located from the pivot of the system to the end of the boom. The payment of the said royalty shall be accompanied by a statement setting out the total of all those sales invoiced in the quarter.

9. It is mutually agreed that three months after the end of each year during the life of this agreement each party shall furnish to the other an itemized statement of all invoices rendered in connection with the sale of the self-propelled sprinkling irrigation systems which have not been paid and which the party furnishing the said statement considers to be uncollectible and there shall be deducted from royalties which become payable hereunder an amount equal to the royalty paid on said invoices. If all, or any part of said invoices are subsequently collected,

royalty on the same as hereinabove set out shall become payable.

10. Each party will from time to time give to the other the full benefits of its respective researches and advices concerning self-propelled irrigators not only as existing but as to any improvements, additions or amendments thereto.

11. The licenses herein granted shall be and remain in full force and effect for the term of 15 years from the date hereof, 1st October 1965 or for the full life of all patents granted to C.M.P. (or its subsidiaries) in connection with its "Rainline" equipment and granted to The American Company in connection with its "Raincar" equipment, and for the life of any improvements of any of said patents and any renewals thereof hereafter granted whichever shall be the longer period and thereafter from quarter to quarter unless terminated by either party giving the other party three months' notice in writing. Upon any termination each party shall thereafter have the right to continue to manufacture and sell its self-propelled irrigators without payment of royalty to the other.

12. Each party is to have the right to send at its own expense any of its personnel to the plant and offices of the other in the United States or Australia so as to acquire technical knowledge and information concerning the self-propelled irrigators.

13. Both parties shall permit the other, or its accountant or agent, at all reasonable times (not exceeding once during any consecutive 6 months) to inspect and take copies of or extracts from any books, accounts, receipts, papers and documents in their possession or control and relating in whole or part to the manufacture or sale of items to which this license applies.

14. Both parties agree not to raise or cause to be raised any question concerning or any objection to the validity of the patents or *trade marks* of the other, and each shall give the other notice in writing of any infringement

or threatened infringement of the patents or *trade marks* which shall at any time and from time to time come to its knowledge.

15. Either party may at its option cancel the license hereby granted by it upon thirty days' written notice to the other party of the other party's failure to pay the royalties becoming due as hereinbefore provided unless such other party has paid such royalty during said thirty-day period.

16. If either of the parties hereto be adjudged insolvent or bankrupt or makes an assignment for the benefit of its creditors, then and thereupon the license granted by the other party to it shall terminate without any notice.

17. This agreement shall enure for the benefit of and be binding upon the respective successors and permitted assigns of the parties hereto.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore written.

THE COMMON SEAL of)
CONSOLIDATED METAL) /s/ J. H. Broinowski
PRODUCTS LIMITED was) J. H. Broinowski.
hereunto affixed by the) Director
authority of the Directors) /s/ John Darling.
previously given in the) John Darling.
presence of the Directors whose) Director.
signatures appear opposite)
hereto and in the presence of:)

(Seal)
/s/ J. Malin
D.F. Perrott Secretary.

Layne & Bowler Pump Co.
By: /s/ R. Charles
/s/ C. D. Bower

DATED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-3632

SIMS CONSOLIDATED, LIMITED,

Plaintiff,

v.

IRRIGATION AND POWER EQUIPMENT, INC., a corporation of Colorado; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation doing business in the State of Colorado; and A. O. SMITH CORPORATION, a corporation of New York doing business in the State of Colorado,

Defendants.

DEPOSITION OF
JOHN HERBERT BROINOWSKI
(Taken by Plaintiff)
May 21, 1973

APPEARANCES:

BROWNE, BEVERIDGE, DEGRANDI & KLINE
By Francis C. Browne, Esq.
Federal Bar Building West
Washington, D. C.
and
DAWSON, NAGEL, SHERMAN & HOWARD
By W. David Pantle, Esq.
First National Bank Building
Denver, Colorado
Appearing on behalf of Plaintiff

YEGGE, HALL & EVANS
By John R. Trigg, Esq. and
Edward H. Widmann, Esq.
1340 Denver Club Building
Denver, Colorado
Appearing on behalf of Defendants.

Also present: Jack Allwood
James N. Johnson

(Appearing on page 4)

MR. TRIGG: Well, I would state for the record that —uh—we are prepared at this time to proceed with the deposition. I would further state for the record that—uh —we are prepared at this time to proceed with the deposition. I would further state for the record that—uh— the alternatives which were offered to us by the Chief Judge with respect to this were either to have the matter referred to a Magistrate, or to proceed in this fashion. On behalf of the defendants, I would state for the record that I am not at all pleased with the method by which we are having to proceed. The statement which you have made concerning the fact that the witnesses were on their way is correct. However, this is not a satisfactory method to resolve the litigation in my judgment, but we are, in effect, forced into the position of having to proceed in the fashion in which we are and—uh—with that statement I presume that we will then proceed and take the deposition as we had been advised to do so.

MR. BROWNE: Counsel for plaintiff is not in disagreement with the comments of counsel for defendants.

Law Offices
DAWSON, NAGEL, SHERMAN & HOWARD
1900 First National Bank Building
Denver, Colorado 80202
266-3401 Area Code 303

September 5, 1973

BY MESSENGER

The Honorable Sherman G. Finesilver
United States District Judge
United States Courthouse
Denver, Colorado 80202

Re: Civil Action C-3632, Sims Consolidated Ltd. v. Irrigation and Power Equipment, Inc., et al

Dear Judge Finesilver:

Enclosed is a summary of each of the depositions in this case. These cover the depositions of nine witnesses.

Mr. Trigg and I have been unable to agree upon the exact wording for the summaries, and frankly concluded that the expense to go through them in detail and reach editorial agreement would be too great to be justified by the results which might be accomplished. The summaries

were initially prepared by a para-legal assistant in our office, and I found that to go through even one deposition working from her summary and editing the summary to my satisfaction took several hours per deposition.

Mr. Trigg and I urge that the summaries of the depositions not be used in place of the testimony in this case, but they may be of some use to all of us. We will confer with you on September 10.

Yours truly,

W. David Pantle

WDP:bp
Enclosures

cc: John R. Trigg, Esq.
Francis C. Browne, Esq.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-293

IRRIGATION AND POWER EQUIPMENT, INC. a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

v.

SIMS CONSOLIDATED, LTD.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

1. Questions for Review

a. The first question of which Petitioners seek review appears to be:

"Were Petitioners denied due process in an action for declaratory judgment of validity and enforcement of a contract tried by the District

Court, without a jury, where the testimony of all witnesses was taken by deposition on oral examination as provided in Rule 30 Fed. R. Civ. Proc., some of which depositions were also recorded by audio-visual means, and the trial court, after having considered briefs and closing arguments, considered the physical exhibits and read transcripts of some, but not all, depositions filed in the court, rendered its decision and entered final judgment."

b. The second question appears to be:

"Where the trial court determined (and the appellate court affirmed) that domestic (California and Colorado) law was applicable to the contract in suit and that the contract was valid and enforceable under such law, was it encumbent upon the court to also consider, invoke and apply Australian law under the provisions of the International Monetary Fund Agreement of 1945?"

2. Petition Fails to Meet Requirements Of Supreme Court Rule 19

a. Criteria to be Considered

The Petition for Writ of Certiorari, as viewed by Respondent, does not fall within the scope of the considerations set forth in Supreme Court Rule 19, except to the extent that Petitioners assert that the judicial proceedings in the non-jury trial in the District Court (sanctioned by the Court of Appeals for the Tenth Circuit in affirming the judgment of the district court) ". . . so far departed from the accepted and usual

course of judicial proceedings as to call for this court's power of supervision. . ." (Petition, page 3).

Petitioners tried, unsuccessfully, to establish in the lower courts that the contract in suit was void and unenforceable under Australian law and therefore the provisions of the International Monetary Fund Agreement of 1945 must be invoked. On appeal, however, Petitioners did not challenge the correctness of the holding of the trial court (affirmed by the appellate court) that only domestic (California and Colorado) law applies to the contract in suit. There is no showing or submission by Petitioners that such holding is in conflict with decisions of any other courts of appeals or of this court. Thus, there is no support for Petitioners' contention that the action of the lower court should be reviewed by this court.

b. Denial of "Trial in Open Court"

The Court of Appeals for the Tenth Circuit pointed out that "Appellants voluntarily chose trial by deposition as part of their trial tactics. Having so elected, they cannot now allege denial of their right to trial." (Appendix to Petition, 37A).

Petitioners failed to advise this court that it was Petitioners who first utilized, over Respondents' objection, the video-audio taping technique in the deposition of its principal witness Robert S. Charles in California. (See Record below, Vol. VII, Vol. XXVII, pp. 336-37, 343-46). A copy of Petitioners' "Notice of Deposition" and of Petitioners' "Memorandum in Opposition" are reproduced as a supplemental appendix to this brief.

The "trial in open court" to which Petitioners refer was held in two parts. The first was held on September 10, 1973. (Appendix to Petition, 46A-47A) when closing arguments by counsel were heard on the issue of validity and enforceability of the contract in issue, the court having previously considered the briefs and having examined some, if not all, of the transcripts of testimony. The second was held on February 21, 1974 on the issue of enforcement to collect the amounts owed under the contract (Appendix to Petition, 49A, para. 6). In the latter phase of the trial, all of the testimony was given by live witnesses who testified in open court. In neither case did either petitioner or respondent move to stay proceedings pending application to the Court of Appeals for the Tenth Circuit for a writ in the nature of mandamus to compel the district court to conduct the depositions or either part of the trial in a different manner. Indeed, there was acquiescence in the procedure on the part of both counsel (Appendix to Petition, 65A; Supplemental Appendix 1, 2-4).

Suffice it to say that this court should not grant certiorari to determine whether or not a district judge must read every word of every deposition at every stage of a case as a prerequisite to rendering judgment in that case, particularly when a full review of evidence by the appellate court finds such deposition testimony to be immaterial. (Appendix to Petition, 38A-39A).

c. "Separation of Powers"

Petitioners have presented a "bootstrap" argument to the effect that the courts in this case have ignored

the constitutional treaty making power of the executive branch in refusing to apply the terms of the International Monetary Fund Articles of Agreement (the 1944 Bretton Woods Agreement) to the contract in suit. Such argument is specious in view of the fact that the District Court and the Circuit Court of Appeals held that the validity and enforcement of the contract in issue are governed by the laws of the United States (California and Colorado), and that under such law the contract *is* valid and enforceable. Accordingly, the lower courts did not find it necessary to consider or apply either Australian law or the provisions of the IMF Agreement of 1945 (Appendix to Petition, 42A).*

d. Petition in Violation of Supreme Court Rule 40, Paragraph 5

The Petition is far from being "free from burdensome, irrelevant, immaterial and scandalous matter" as required by Supreme Court Rule 40, which matter should, therefore, be disregarded and stricken.

It is obvious that applicability of Australian law to the contract would be a prerequisite to application or interpretation of the International Monetary Fund Agreement to the contract in suit. Wherefore, all references to the Australian Banking Regulations and the International Monetary Fund Agreement are *irrelevant.*

---

*At no point does Petitioner challenge the correctness of the holdings below that neither Australian law nor the provisions of the International Monetary Fund Agreement of 1945 are applicable to the contract in issue.

It is apparent on its face that the petition is "burdensome". Five typewritten pages are devoted to a "statement of the case" (Petition, 5 through 9), notwithstanding the fact that the opinions of the lower courts clearly set forth the facts and law of the case and were reproduced in their entirety in the Appendix to the Petition. (Appendix to Petition 1A-42A).

Respondent respectfully submits that Petitioners have made scandalous charges against Respondent on pages 13 and 14 of the petition. Without any evidence whatever in support thereof, Petitioners assert that Respondent "surreptitiously" sought retroactive approval of the contract in suit by the Australian government authorities after Petitioners unilaterally sought to rescind the agreement and that the approval was thereafter "deceptively sought" by Respondent.

Petitioners' positions throughout the controversy with Respondent have been totally devoid of merit and are believed to have been interposed solely for the purpose of delaying payment of amounts lawfully due Respondent under the contract in suit. Indeed, the Circuit Court of Appeals not only indicated it was "puzzled" by Petitioners' ambivalent position on the manner of conducting the trial (Appendix to Petition, 37A) but also was critical of Petitioners' contentions on the merits of the case, stating:

> "These theories, advanced in defiance of logic and without support of cogent authority, do not comport with the facts of this case". (Appendix to Petition, 39A)

The Court of Appeals said further, with respect to Petitioners' ill-founded contention as to lack of consideration for the contract:

"Appellants' argument that the contract lacked consideration is, as noted by the trial court, illusory. The speculative arguments of appellants give rise, at best, to the possibility that there was not a meeting of minds. Such a speculative conclusion, however, would be diametrically opposed to the facts which establish the formation of a contract, its execution and continued vitality, and the unilateral termination and repudiation thereof by Appellant Smith. (Appendix to Petition 40A)

3. The Law

a. Procedure

There is no issue of law left for this court to settle as a "substantial federal question" or a departure from "accepted and usual course of judicial proceedings", since this court settled in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) that reference of a case to a master is discretionary, and the use at trial of depositions taken under Rule 30 Fed. R. Civ. P. is governed by Rule 32 Fed. R. Civ. P. and the option was given the parties to bring the case to trial by either means. The normal procedure for seeking judicial review of Petitioners' grievance would have been by the means set forth in the Federal Rules of Civil Procedure, Rules 30 and 32, or by seeking a writ in the nature of mandamus, as in the *La Buy* case, *supra*.

This court distinguished the facts in the recent case of *Wingo v. Wedding*, 418 U.S. 461 (1974) from those in *La Buy v. Howes Leather Co.*, *supra*, in that the action taken in *Wingo* was contrary to a specific rule (statute) requiring not only a "hearing" but that such

hearing be held by the *court*, not a magistrate. Since the present case did not involve a specific statute or rule requiring witnesses to be "heard" and there was neither a magistrate nor a master, *Wingo v. Wedding* is inapposite.

While most of the precedents cited in support of the opinion of the Tenth Circuit Court of Appeals are from its own circuit, those taken from other circuits, such as the Third and Sixth, are not in conflict. Since no conflict is shown in the petition, review of this case on writ of certiorari is not warranted.

b. Applicable Law of Contracts

The opinion of the district court is replete with citations of precedents from the principal states of California (the state of execution and original performance of the contract in suit) and Colorado (the state in which performance is continuing, in breach, and in which enforcement is sought) as well as of this court, the Tenth Circuit Court of Appeals and various texts, none of which are asserted in the present petition to be in conflict with the conclusions in this case or with each other. Indeed, the Australian law was taken into consideration by the trial court and the appellate court to the extent that it was not only found not to apply, but also was not inconsistent with United States law in the absence of extra-territorial applicability of regulation 8 of the Australian Banking and Currency Regulations. (Appendix to Petition, 20A-21A, 41A-42A).

4. Conclusion

This is a simple contract case in which the threshhold question was the venue of the law as to execution of the contract. The venue was determined to be in California. Under California law the contract was held to be valid and enforceable. Since continued performance was and is in Colorado, the law of that state was held to be applicable to continued enforcement of the contract. Since the Colorado law was not in conflict with the law of California, performance was and is governed by Colorado law. Thus, there was no reason to reach the question of applicability of Australian law either as to execution or performance.

All of the protestations of Petitioners about "denial of due process" and applicability of the "treaty obligation" of the United States under the International Monetary Fund Agreement completely circumvent the issue of correctness of the threshhold question of venue of execution. Indeed Petitioners' positions have been shown to be so patently "illusory" that it would be a waste of the time of this court and the taxpayers' money to hear, on the merits, the unmeritorious questions of which reivew is sought.

Respectfully submitted,

FRANCIS C. BROWNE
Browne, Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006

and

EDWARD T. COLBERT
Browne, Beveridge, DeGrandi & Kline
1819 H Street, N.W.
Washington, D.C. 20006

September 25, 1975

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SIMS CONSOLIDATED, LTD.,
Plaintiff,

vs.

IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California qualified as a foreign corporation, doing business in the State of Colorado; and A. O. Smith CORPORATION, a New York corporation, doing business in the State of Colorado,
Defendants.

Civil Action No. 3632

NOTICE TO TAKE DEPOSITION BY VIDEO-TAPE

To the above named plaintiff
and his attorneys:
W. David Pantle
1900 First National Bank Building
Denver, Colorado 80202
Francis C. Browne, of Browne,
Beveridge, DeGrandi & Kline
1819 H. Street, N.W.
Washington, D.C. 20006

YOU ARE HEREBY NOTICED that on Monday, the 14th day of May, 1973, at 9:30 a.m., the defendants

will take the deposition of Robert S. Charles at 2700 Oak Knoll Avenue, San Marino, California, for the purpose of preserving his testimony at the trial of the above captioned case. Said deposition shall be taken pursuant to the Federal Rules of Civil Procedure, on oral interrogatories, in the presence of a notary public and a certified shorthand reporter, and shall be video-taped, and you shall be present, as you are so advised.

DATED this 7 day of May, 1973.

/s/John R. Trigg
John R. Trigg
of YEGGE, HALL & EVANS
Attorney for Defendants
1340 Denver Club Building
Denver, Colorado 80202 222-2855

CERTIFICATE OF HAND DELIVERY

I hereby certify that on the 7th day of May, 1973, I delivered by hand a copy of the foregoing Notice to Take Deposition by Video-tape to the attorney for the plaintiff, W. David Pantle, at 1900 First National Bank Building, Denver, Colorado.

/s/John R. Trigg

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of May, 1973, that I mailed a true and exact copy of the foregoing Notice to Take Deposition by Video-tape to the attorney for the plaintiff, Francis C. Browne, of Browne, Beveridge, et al, at 1819 H. Street, N.W., Washington, D.C. 20006, by depositing the same in the U.S. Mail, postage prepaid.

/s/John R. Trigg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SIMS CONSOLIDATED, LTD.,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
vs.	)	3632
	)	
IRRIGATION AND POWER EQUIPMENT, INC., a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California qualified as a foreign corporation, doing business in the State of Colorado; and A.O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,	)	**STATEMENT IN OPPOSITION TO MOTION TO QUASH NOTICE OF DEPOSITION, AND MOTIO TO PERMIT DEPOSITION TO BE TAKEN BY VIDEOTAPE**
	)	
Defendants.	)	

COME NOW the defendants, above named, by and through their attorney, John R. Trigg of Yegge, Hall and Evans, and make the following statement to the Court as to why the plaintiff's Motion to Quash Notice of Deposition should be denied, and request the Court for an Order permitting the deposition to proceed to be taken, pursuant to the Federal Rules of Civil Procedure, in the presence of a notary public and certified shorthand reporter, and to also be videotaped, as permitted by the Federal Rules of Civil Procedure, Rule 30(b)(4), which provides:

> The court may, upon motion, order that the testimony at a deposition be recorded by other

> than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made; a party may nevertheless arrange to have the stenographic transcription made at his own expense.

It is provided in the Notice for Deposition previously issued that we shall provide a certified shorthand reporter to stenographically report said deposition to assure the accuracy of the videotape.

One of the primary contentions of the plaintiff is that they are inconvenienced by the fact that the deposition is going to be taken. We would respectfully submit that we have complied with the provisions of the Local Rules of Practice of the United States District Court for the District of Colorado, Rule 7(a), which provides that reasonable notice is five (5) days. Plaintiff further contends that the Notice of Deposition provides that the deposition will be taken by videotape and may involve considerable unnecessary expense for the parties. It should be pointed out to the Court that we verbally stated to counsel for the plaintiff that if he would stipulate to the taking of the deposition by videotape, as we asked him to do, that we would stand responsible for the cost of the videotaping of the deposition at no expense to him whatsoever. This included the statement that we would not attempt to tax such expense as a cost when we are ultimately successful in the defense of the case.

In paragraph 6 of ther [sic] Motion, the plaintiff's attorney contends that it is inconvenient for them to be in California on May 14, 1973, since Trial Briefs,

including proposed findings of facts and conclusions of law are required by the Pre-Trial Order to be exchanged by May 15, 1973. In response to this contention, we would merely point out to the Court that this deadline has been set since January of 1973, and their contention that they are going to prepare their Brief on the day before it is due does not deserve the consideration of this Court.

Finally, it should be pointed out that the plaintiff, in the "Supplementary Memorandum of Plaintiff in Opposition to Motion for Continuance", previously filed by the defendants, which has been denied by the Court, states in the last sentence thereof that they were willing to permit the deposition of Mr. A.C. King, one of the defendants' crucial witnesses, to be taken in Australia before the trial. Their contention that they are unable to get to California, but could have arrived in Australia for a deposition, deserves no further comment. The plaintiff further stated in the same "Supplementary Memorandum" that"

> "There is no need for the continuance, as adequate time remains to assemble any further evidence which the parties need for trial."

WHEREFORE, it is respectfully requested that this Court enter the Order permitting the deposition scheduled for May 14, 1973, to be taken as scheduled, and to enter an Order permitting the same to be recorded by videotape transcription and stenographically reported, but if the Court is not disposed to permit videotaping of the deposition, that the Court permit the deposition to proceed as scheduled, as reasonable notice has been given, as required by the Federal Rules of Civil Procedure, and the Local Rules

of Practice of the United States District Court for the District of Colorado.

Respectfully submitted,

/s/ John R. Trigg
John R. Trigg
of YEGGE, HALL & EVANS
Attorney for Defendants
1340 Denver Club Building
Denver, Colorado 80202 222-2855

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true copy of the foregoing Statement in Opposition to Motion to Quash Notice of Deposition, and Motion to Permit Deposition to Be Taken by Videotape, and a copy of defendants' Motion to Strike Plaintiff's Request for Statement of Facts and Opinions Held by Expert Witnesses Listed by Defendants, to the attorney for the plaintiffs, Mr. W. David Pantle, at 1900 First National Bank Building, Denver, Colorado, this 9th day of May, 1973.

/s/ John R. Trigg

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SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-293

IRRIGATION AND POWER EQUIPMENT, INC. a Colorado corporation; LAYNE & BOWLER PUMP COMPANY, a corporation of California, qualified as a foreign corporation, doing business in the State of Colorado; and A. O. SMITH CORPORATION, a New York corporation, doing business in the State of Colorado,

Petitioners,

v.

SIMS CONSOLIDATED, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOHN R. TRIGG
of Yegge, Hall and Evans
1340 Denver Club Building
Denver, Colorado 80202

and

JAMES N. JOHNSON, ESQ.
Vice President and General Counsel
A. O. Smith Corporation
Milwaukee, Wisconsin

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Petitioners,

v.

SIMS CONSOLIDATED, LTD.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

I. THE OPPOSING BRIEF MISSTATES THE HISTORY OF THE CASE AND THE ISSUES OF THIS APPEAL

A. Respondent takes advantage of the limited record established as the Appendix to the Petition herein and of the fact that briefs of the parties before the Court below are not

here available. With that advantage at hand, respondent asserts, at Page 3 of the Opposing Brief:

> "On appeal, however, petitioners did not challenge the correctness of the holding of the trial court . . . that only domestic . . . law applies to the contract in suit."

To the contrary, petitioner's Opening Brief on Appeal sets forth the following argument at page 34:

> "C. AUSTRALIAN LAW CONTROLS AND RENDERS THE CONTRACT VOID."

Petitioner's Brief on Appeal then continues for more than three pages to "challenge the correctness of the holding of the trial court . . . that only domestic . . . law applies to the contract in suit."

B. On Page 2 of the Opposing Brief on file here, counsel states:

> ". . . the testimony of all the witnesses was taken by deposition on oral examination as provided in Rule 30 Federal Rules of Civil Procedure; . . ."

The order of the trial court entered July 12, 1973, and contained at Page 44A and 45A of the Appendix states that:

> "The parties, with the Chief Judge, agreed (Read 'Elected') to proceed by trial on depositions. . ."

Please note the absence of any reference to Rule 30 FRCP. Only the depositions whose transcripts the trial judge refused to read were taken under Rule 30. The videotape testimony was trial testimony taken somewhat in the fashion of a deposition. Petitioners have questioned at Pages 20 and 21 of the petition whether that testimony was properly

characterized as a "deposition" at all and it certainly was not a "deposition" which Rule 30 FRCP or Rule 32 FRCP contemplate. A total lack of attention to the rudimentary requirements of Rule 30 FRCP by the parties, including the failure to present such depositions to the witnesses for signature demonstrates this fact.

II. PETITIONERS WERE DENIED RIGHT OF COUNSEL WHEN THE TRIAL JUDGE FAILED TO READ "EVERY WORD OF EVERY DEPOSITION."

On Page 4 of the opposing brief, respondent asserts that this court "should not grant certiorari to determine whether or not a district judge must read every word of every deposition at every stage of a case as a prerequisite to rendering judgment in that case, . . .". Under the unique procedure by which this case was tried, that is the exact question. Where a trial judge has heard a trial in open court his reading of all depositions may not be required, but where all testimony was taken out of his presence in the first instance, isn't his thorough and independent review required? The trial judge told the parties he had completed a thorough review. In this suit, after the "trial" testimony on liability had been completed and as oral argument was about to commence, the trial judge stated in open court:

> ". . . the Court will allow . . . an hour to a side. . . .
>
> ". . . the Court has either viewed the videotapes or the depositions as to *all* individuals. . . . (Emphasis supplied)
>
> ". . . I think counsel have a right to know exactly where we stand right now so this might assist you in your presentation of what you think might be concentrated on, as the case might be."
> (Record on Appeal, Vol. I, p. 4)

With that introductory representation by the judge, counsel undertook oral argument on the liability issue. Counsel had no way of determining that the judge had not read the testimony of four out of nine witnesses and, that he didn't intend to. Counsel certainly have a right to rely on representations of a trial judge that he has performed the duties of his office. When counsel does so in framing his oral argument for purposes of emphasis, then to the extent that representations later prove to be without basis in fact, the client has been deprived of the right to effective counsel.

III. THE PETITION COMPLIES WITH THE RULES OF THIS COURT.

Respondent has also raised anew, compliance by petitioner with Rule 40 of this Court in the following respects:

A. **Relevancy.** (Brief, p. 5)

Respondent contends argument on application of the IMF Articles to be irrelevant because such an assertion by petitioner first requires application of Australian law when the trial court has not done so and the court below affirmed. Respondent misses the point.

The facts are not in dispute with respect to the failure of respondent to secure permission of the bank, before entering into the contract, as was required by the Australian law. Respondent came to the United States with that contract in hand and sought enforcement. The trial judge refused to give extra-territorial effect to the Australian law and found California law to be applicable. All that has nothing to do with the IMF Articles.

First, of course, is the well known rule that contracts may be unenforceable even though they are neither

void nor voidable. Williston, *Contracts*, 3rd Ed. Second, the pertinent IMF Article is directed to contracts "which involve the currency of any member and which are contrary to the exchange control regulations of that member. . . ." Here, it is the Australian currency regulations which have been violated and the trial judge did not rule to the contrary. He simply found California law to be applicable on validity in attempting to solve the dispute between the parties. It is hardly irrelevant to point out that, under the IMF Articles, the question ceases to be one solely between the parties and comes into focus as one where their interests are to be subordinated to the superior concern of the public good in general all as proclaimed by the treaty. 17 Am. Jur. 2d *Contracts*, Section 232. The error of the trial court was not confined to refusing to apply Australian law in favor of the law of California; rather, that error was compounded in failing to apply the IMF Articles which supercede the California law and declare the contract to be unenforceable anywhere in the United States irrespective of the validity of the contract under the law of one of those states.

B. Burdensomeness. (Brief, p. 6)

Here respondent chastises petitioner for setting forth the facts. It was for the convenience of the court. The assertion is ridiculous on its face.

C. Scandalous Charges. (Brief, p. 6)

Respondent contends that there is no evidence to support the surreptitious or deceitful conduct of respondent's application to the bank for the belated approval of the contract required by Australian law. Admittedly, respondent's continuous use of the truth as a device to be bent and twisted requires petitioner to refer to additional record references which may cause burdensomeness, but petitioner has no other

choice. CMP's Broinowski was asked whether CMP disclosed to the bank, at the time application was made for approval, that the contract has been rescinded. Broinowski answered:

> "I know there were no conferences with the bank ... just that exchange of letters which is on the record."
> (App. in the Tenth Circuit, Vol. I, pp. 210-211)

D. MATERIALITY. (Brief, p. 6)

Respondent quotes and relies on the decisions of the lower courts (as to which review is sought) and questions the right of the petitioner to challenge them both on procedure and merit. Respondent can take no comfort from the situation in the trial court which ended in respondent's favor. No party, in determining its trial tactics may justifiably rely on the correctness of the trial court's rulings. *Gore v. Northeast Airlines,* 373 F.2d 717 (CA 2 1967).

IV. WINGO IS CONTROLLING.

Both respondent and the court below have trouble in understanding petitioner's reliance on *Wingo v. Wedding,* 418 U.S. 461 (1974). It is so recent a decision that we do not desire to take up the time of the Court in a complete review. Suffice it to say that it is a most apt declaration of the prevailing law applicable to the question at hand. The fact that in *Wingo, supra,* the procedure found to be wanting had been undertaken by virtue of a local rule of court is irrelevant. The election required of the parties pursuant to the chief judge's order in this case is the exact equivalent of the local rule in *Wingo,* which allowed a magistrate to conduct an evidentiary hearing with electronic recording to be thereafter heard by the judge in a *de novo* fashion. The Habeas Corpus Act, 28 U.S.C. Section 2243, which this court held in *Wingo*

required the "court" to conduct the hearing is nothing more than its equivalent in civil law found at Rule 77(b) FRCP which requires:

> "All trials upon the merits shall be conducted in open court. . . ."

Wingo reaffirms those elements necessary to establish a trial; it makes no difference how that trial was denied to the litigants.

V. BAD FACTS TEND TO MAKE BAD LAW.

Both courts below and respondent (more understandably) have found the rescission by L&B after six years of so-called compliance with the contract to be conduct sufficient to bring wrath down upon L & B and A. O. Smith. Petitioners acknowledge that a heavy burden descends upon a party who cancels or rescinds an existing contract. He is met with charges such as "why did you sign it at all" or "why didn't you know all this before".

Petitioners submit that they have met the burden when they are able to show that, 1. this contract was entered into without any counsel being present. Even the counsel who had participated in earlier drafting is not now counsel for L&B nor is Sims represented by its then current counsel. The parties can hardly be criticized for not understanding the legal effect of their acts; 2. twice before the rescission, L&B requested contract relief from CMP and it was contumaciously rejected; and 3. the key factor in rescission was the failure of CMP (without L&B's knowledge) to secure prior bank approval thus rendering the contract void in the opinion of L&B's Australian solicitor. When L&B found out that CMP could take all the fruits of the contract and refuse compliance at any time because of Australian currency regulations and

the IMF Articles, L&B rescinded. CMP provided a perfectly reasonable ground for rescission by L&B in undertaking entry into an unenforceable agreement. L&B cannot be estopped from rescission prior to its knowledge of the illegality of the contract. 17 Am. Jur. 2d *Contracts,* Section 511.

To permit the decisions of the lower courts to stand will result in petitioner's being penalized for now knowing that CMP had violated the laws of its own country. That is injustice.

VI. CONCLUSION.

The Petition for Certiorari previously filed herein should be granted to correct the injustice suffered as a result of the denial of due process to the petitioner and frustration of public policy set forth in the IMF Articles all as fully outlined in the Petition for Certiorari.

Respectfully submitted,

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and

James N. Johnson, Esq.
General Counsel
A. O. Smith Corporation
Milwaukee, Wisconsin

October 10, 1975 *ATTORNEYS FOR PETITIONERS*